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**THE THEORY AND PRACTICE OF  
MODERN GOVERNMENT**

BY THE SAME AUTHOR

FOREIGN GOVERNMENTS AT WORK

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REPRESENTATIVE GOVERNMENT AND A PARLIAMENT OF  
INDUSTRY

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# THE THEORY AND PRACTICE OF MODERN GOVERNMENT

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IN TWO VOLUMES

VOLUME I



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To  
GRAHAM WALLAS AND EDWIN CANNAN  
MY TEACHERS  
AND  
PAUL  
A MAN OF CHARACTER



## PREFACE

**S**INCE I plunge at once into the middle of things in the opening chapter I may here be permitted a few words to explain what this book is about.

It seemed to me highly desirable that the whole apparatus of government should be surveyed by one mind in a single work. No study of this scope and plan exists in any language. Its material is drawn chiefly from the experience of Great Britain, France, Germany and the United States of America. Such a treatise is long, for the scope is immensely wide, and to understand, one is, after all, obliged to explain. Government, the most difficult, the most complex, and the most exacting art of all, is not to be taught in a few words, or mastered as we run. The length of the book is an unavoidable result of its contents.

May I present, in a few words, what I believe to be the distinguishing features of this work? First, the contents convey some idea of its comprehensiveness; and its comprehensiveness is due to three circumstances: the subjects handled, the inclusion of novel and important facts, and the depth to which the analysis is pressed. Among the subjects never before treated with such care, some hardly at all, are State Activity, Constitutions, Federalism, Political Parties, Parliaments, the Executive, and the Civil Service in the Modern State. Nor has any work hitherto regarded and presented the various elements of government as a living whole, showing the interrelations between the parts, and the unity and the consistency of the vital tendencies actuating them. Even where the topics have been treated before, the present study contains something new, be it in facts, or interpretation, on every page.

Secondly, this work is founded upon all the available material, primary sources and secondary works, and, what is more, upon my own direct observation for several years of the countries concerned, and, in some cases, upon actual experience.

Thirdly, the discussion is conducted on two principles: (*a*) scientific treatment, with the intention, not of advertising a particular set of reforms following from private or party policy, but of explaining



objectively the why and wherefore of things, and (b) simple and clear exposition.

Directly arising out of these aspects of the treatise, is its fourth feature, the ample citations and references. Some of these are needed to give authority to statements made in the text, but many others are included to amplify and illuminate it, and to guide the reader along further avenues of research and speculation. In almost every case the foreign citations have been translated into English.

Fifthly, the main political institutions of the Western World are surveyed not only in their legal form, but in their operation. Yet, of even greater moment than the generally observed divergence between law in books and law in action revealed by such a method, are the psychological and environmental necessities which give rise to the law, and which, like the Fates, press inexorably onwards, beyond the law as it is embodied in the neatest of institutions, to convert it to new, and not seldom unintended, ends. Thus the book is concerned with the dynamic and the developmental in the process and structure of Government, with the causes of the rise of certain political theories, with the invention of their appropriate machinery, and then with the conditions and character of their serviceability.

That there is a connexion between governmental activities and the ever-renewed streams of life and effort is, of course, well known, but the nature and modes of that connexion are not so well comprehended. The analysis of this function, therefore, runs through the entire book—the convergence of individual and group sentiments, desires and capacities and of the Natural elements upon Government, and their powers to penetrate, mould and control, are shown in many of their various manifestations. Nor do we ignore the reciprocal effect of Government upon its sustaining forces.

The work, accordingly, traces in a scientific spirit, the generation, development, institutional embodiment and operation, of Government, from the first impulses to the final expression and success or failure, through all the unavoidable stages. It treats the material, however, not in the fashion of previous studies, like those of Lowell and Bryce, country by country, but subject by subject—each set of institutions is taken for all countries together. That is, it is truly comparative, and this affords the basis for sound generalization. There is disadvantage in such a dissection of separate institutions. But this must be suffered: and it is, in fact, mitigated by appropriate warnings at the proper places, and by the Index, which is designed to render convenient a re-integration of the institutions of each country, if that is desired. Against the loss of the all-dimensional, relative sense, there is the great gain of analysis and immediate

comparison : clearer revelation of the uniformities of human nature in government.

Since the foundation of the study is the political activity of four democracies, Great Britain, France, Germany and the United States of America, it may be thought rather restricted as a basis of generalization for all government, yet I venture to believe that the fullness of the material used, and the caution with which it has been handled, will give the judgements expressed a universal application. I have been obliged, for reasons of space, to exclude direct analysis of Italy and Russia : nevertheless, the work will amply prepare the reader independently to understand the nature and reasons of those systems of government. In fact, I have often, where especially appropriate, drawn attention to the relevance of problems in the democracies to these other countries, and I have had their experience continually in mind.

Finally, I have been obliged to leave the subjects of *Local Government* and the *Judiciary* to later volumes. I hope the former will appear within a year or so from the time of publication of this work. Again, some of the institutions of some countries have received less space than others ; this is because they may, like federalism, or a second chamber, for example, play a smaller part in one country than in others.

The scope of the subject pressed me inevitably, if unwillingly, to two volumes. As the work is all of one texture, closely interwoven, they must not be considered separate and entirely independent. However, the division is made at a point which gives each volume a certain standing of its own. Their respective contents are shown in the Synopsis.

I hope that if I have not adequately explained all the things I set out to explain, or have entirely omitted others, that the mere programme will not be unhelpful. Perhaps my students at the London School of Economics will press on with me to the exploration of the deserts of our present ignorance, and make a dozen monographs grow where only one grew before.

I wish to thank the Rockefeller Foundation for a year in the U.S.A. and for the assistance of a secretary, Miss Olive Rosenheim, (for whose services I am grateful), in the final stages to help to check my references.

My friend and colleague Professor H. J. Laski was good enough to read my typescript : to him, and all my colleagues, I am grateful for many opportunities to learn, not least when they were unconscious of their helpfulness.

To Mr. Headicar, Mr. Fuller, Mrs. Watts, and the assistants of the

Library of the London School of Economics, I am grateful for their unfailing courtesy under provocation, their inexhaustible willingness and a rare devotion to professional duty. Every day for years I have had the benefit of these qualities.

*November 1931*

H. F.

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‘ Out of such crooked material as man is made of, nothing can be hammered quite straight.’—KANT

‘ If it is true that one cannot annihilate vice, the science of those who govern is to make it contribute to the public good.’—VAUVENARGUES

# PART I

## THE DYNAMIC FORCES

### CHAPTER I. GOVERNMENT AND THE STATE

### CHAPTER II. POLITICS AND ECONOMICS

‘Justice without power is unavailing; power without justice is tyrannical. Justice without power is gainsaid, because the wicked always exist; power without justice is condemned. We must therefore combine justice and power, making what is just strong, and what is strong just.’—PASCAL.

‘On what shall man found the economy of the world which he would fain govern? If on the caprice of each man, all is confusion. If on justice, man is ignorant of it.’—PASCAL.



# THE THEORY AND PRACTICE OF MODERN GOVERNMENT

## PART I: THE DYNAMIC FORCES

### CHAPTER I

#### GOVERNMENT AND THE STATE

**T**HIS book treats of Modern Government and the Institutions through which it operates. It describes and explains the origin, nature and operation of Modern Political Institutions.

Some have sought to extend and deepen their knowledge of man's political nature by scanning the history of political theories, that is, the analysis of history, motive, function and aspiration as taught by certain outstanding minds. This has its uses, and cannot be dispensed with. More perhaps is to be obtained by bearing in mind that the chief and ultimate problem is that of Motive : what compels men to act in the way they do ? Answer that question, and all that the political scientist needs to know is answered. Wherever it is possible, the present investigation therefore proceeds : What did men intend ? What motives, psychological, physical and environmental, produced the intention ? How was the intention formulated in reasoned theory ? What institutions were created to give effect to it ? Were they successful ? ' If not, why not ? If they were, what caused success ? Now it often happens that intentions are obscure, ambiguously formulated, that motives are not chronicled by trustworthy contemporaries, or that men speak in the words of convention and lip-service, consciously or unconsciously, and hide the forces which really drive them. All this makes this method of inquiry extremely difficult and often impossible, but it is indispensable.

**Human Nature and the State.** Political institutions are special arrangements of human qualities—co-operative and separative—directed towards a desired end. Throughout its whole being, the body of political institutions is human, *no more and no less*, and no institution of government can be understood without the continuous application of our knowledge of human nature in general. There are some things we may demand of political institutions, and obtain, now

with ease, now with difficulty ; there are other demands, which go beyond anything men can grant, to which the only response is an ineffective labouring of the machine, and the disappointment of citizens and officials. This becomes plain as soon as we discuss, for example, the conditions of State Activity, the function of Parliaments and Civil Services, and the hundred other forms in which the State is evident to us.

What is the nature of this branch of human activity called political ? Out of what fundamental hopes and compulsions do political institutions emerge, and what particular energy subserves their operation ? These questions bring us to the very essence of our general problem, for *single* institutions, parties, parliaments, electoral systems, and so on, are ever subordinated by statesmen to the ultimate plan and basis of policy. What is this plan and basis ? The strong, the deep, the central current of the statesman's activity makes steadily for the maintenance and reformation of that order of human relationships called ' the State '. In the works of students, as in the language of the streets and of politics, the State is often spoken of as the energy and directing force of political institutions. The question therefore becomes : What is the nature of the State ? For of this, the governmental activities which, every day, impinge upon our consciousness and behaviour, the activities of the medical officer of health, the school teacher, the postman, the Judges, the police, are the continuous and infinitely varying expression.

It is not that political institutions and government are resident only within the context of the State. Such a view gives too distinctive a meaning to the nature of the State. It is wrong in itself, and it produces a second error, namely, that to learn the secrets of the State in operation, the State alone should be observed. The truth—of vital importance to the political scientist—is that the behaviour of men and things within the State is neither better nor worse, neither simpler nor more complex, than that of human beings and societies outside it. Political behaviour existed before States arose, and it even now exists outside them. In order to be politic it is not necessary to make all the gestures, and be dressed in the clothes, or frequent the gathering-places, of modern politicians. Every act of our lives is an act of government, and every plan is a policy. Were there no State, so long as there were people living near each other, there would still be government and politics. For we remain alive subject to satisfying certain physiological and psychological needs, and, in pursuit of what each believes to be essential satisfactions, we are obliged to adapt our behaviour to our ends and to the claims of other people.

This adaptation bears all the marks of political behaviour : in the course of it, for a long period or for a passing emergency, a special ordering of relationships—a *special form of association*—takes place to govern its process. Our daily life amply demonstrates that much of what is essentially politics and government goes on without the

cognizance of the State, and where the State could not, in fact, make its wishes effective. The State is not characterized, then, by the monopoly of political behaviour distinguishable from any other human behaviour of a practical and purposive nature.<sup>1</sup> It is true, of course, that we find in the State an organization and institutions whose special character does give rise to problems and judgements different from those involved in other institutions, as, for instance, in the clan, or the family, or the trade union. Those differences are striking, and we shall explore their nature, for they are the product of the same human energies but in pursuit of different ends.

How old, too, is the general store of apparatus which men have created for the purposes of life and development—the order of hunting and distribution of spoils, the rotation and priority of pasture for their flocks, family-life and clan-life, tribal-relationships, the churches, the guilds, the city! How young beside them the State as we know it! It is hardly, even in its most venerable pillars, older than Luther and Shakespeare, and some of its essential engines were delivered only yesterday. The State will not mean to us what it actually is unless we recognize its extreme youth. In the perspective of world-history it is a pretentious juvenile, lately come of age, insisting upon its maturity among jealous elders. Its utility is still upon trial.

If we attempted to define the State graphically, that is, by enumerating all its features, we should write down a long list, for the complete definition ought not to exclude even the smallest of a multitude of particulars. To proceed by abstraction in the case of so vast an entity is dangerous, for one may read into the facts a distinctive quality which is not actually there, or which is transient, or local. This, we shall show later, actually happened to the term State. Let us consider some of the characteristics alleged as essential to the State.

**Supremacy.** It has been said that the distinguishing feature of the State is its possession of the supreme power to compel individuals and associations to act according to its will.<sup>2</sup> This supremacy does, indeed, mark it off from other human associations. Yet it must not be forgotten that everywhere constraint and compulsion exist outside the sphere ascribed to the State. We may refuse to trade with others and so bring them to terms; a sensitive person may be mocked until he is expelled from our club or circle; we may 'freeze out' an alleged 'outsider'; a bully may secure the government of a family because its members are too kind and gentle to retaliate; division and secession may be provoked by a purposely instituted controversy, during which the passions are so played upon, that co-operation is thenceforward impossible. Throughout society there are, at every moment, innum-

<sup>1</sup> Cf. Croce, *Grundlagen der Politik*, München, 1924, p. 5.

<sup>2</sup> Cf. Duguit, footnote, p. 19 *infra*; and from among Treitschke's many dicta: 'The truth remains that the essence of the state consists in its incompatibility with any power over it' (*Politics*, I, 28).

able tales of triumph and misery, of compulsion victorious or vain, with which political institutions have had no concern, and perhaps cannot, by their nature, have any concern. That associated behaviour, regulated behaviour, constrained and compelled behaviour, proceeds through the State is not in question. But the State is not the only institution exerting constraint. It is, however, often called in to overpower 'unfair' 'immoral' constraint, constraint, too, which is against 'public policy'. Not power, then, but *supreme* power is claimed, and, *normally*, but not always, possessed by the State.

Territory, together with supremacy, are special marks of the State. It has had, and can have, successful competitors in this respect. There are commercial and industrial organizations which supply goods and services and act systematically and continuously over the whole area within the customs line which so well marks the zone of the modern State. We have only to recall the wide ramifications of railways and banking institutions. Before the German Empire became a Federal State, the territories were under a single set of customs and other economic regulations drawn up by a central Customs Parliament.<sup>1</sup> But the territory so covered was not a State; though politics was the substance of its proceedings. In the long and fascinating history of English Poor Law Administration, there is at least one project for a Company to take over the duties assumed by the State and to cover its whole territory with a more efficient institution.<sup>2</sup> While in that of public health there was an almost nation-wide small-pox society before the local health authorities were created.<sup>3</sup>

The French Trade Unions are obliged to cover the area of France with Bourses du Travail which administer a Labour Exchange system<sup>4</sup>; and in the United States of America the Trade Unions carry out functions of social insurance similar to those administered by the State in England.<sup>5</sup> There are churches whose frontiers are so far-flung, that we can even say of them, as we cannot of the State, that they have no frontiers. But within a large territory not easily alterable, the State claims, is accorded, and normally exercises a general supremacy.

It is important further to remember that every State, being based upon a defined territory, those who accept the State are obliged to accept the consequences of its location. Of these consequences all those resulting from its geographical conditions and relationship with neighbours are especially important. Further, people are obliged to live with and be affected by the civilization contained within its limits. Those who do not accept the State as it is are obliged, in our own day, to try to effect the changes they desire within the State of their citizen-

<sup>1</sup> See Weber, *Der Zollverein* (1869).

<sup>2</sup> Eden, *The State of the Poor*.

<sup>3</sup> Buer, *Health, Wealth and Population*, London, 1926, Chap. XIV.

<sup>4</sup> Pic, *Traité Élémentaire de Législation Industrielle*, Paris, 1922, p. 292 ff.

<sup>5</sup> Commons (and others), *History of Labour in the United States*, New York, 1921, pp. 124, 335 ff.

ship, since it is very difficult, indeed almost impossible, to emigrate to other States which may offer acceptable alternatives. Moreover, the extent of the area of the State becomes of vital importance to the success or failure of certain kinds of State activity.

Though many divinities compete for majesty with Hegel's god, the State is, in fact, very aptly characterized by the all-roundness of its contacts, by its multitudinous tasks, by the extent to which it is accustomed to be called upon to assume duties, and more importantly, by the extent to which public approval is expected, when men and women call upon the State to lend its peculiar aid to attain their ends. Its omniscience is a very important feature of the State,<sup>1</sup> but it is not all : it is only the expression of something more fundamental. If we relied upon this alone as the criterion of the State we should have a feature that differs very much from one State to another. For in the Soviet Republic of Russia the functions of the State are, in theory, at least, unlimited, while in the U.S.A. individualism has so far very much limited State activity both in theory and practice, and between these extremes there is great diversity in England, France, Germany and other States.

**Recognition.** There must be added to this the State's life-force, namely, the *recognition* that it is the supreme authority in its territory, over all other institutions and behaviour, whatever actual forces may, in fact, dictate the actual use of its authority. The State is authority, authority to which all institutions within its territory are expected to bow and render obedience. It is power, of a nature to be more circumstantially described later. Jean Bodin, the father of the modern doctrine of Sovereignty, defined this special character of the State in terms which, in their context, have never yet been improved upon. '*Majestas est summa in cives ac subditos legibusque soluta potestas.*'<sup>2</sup> 'Sovereignty is the highest power over citizens and subjects, unrestrained by the laws.' All other institutions may have power and territory but this alone has, normally, *recognized* supremacy over all. Substantially the same character is ascribed to the State by major thinkers among those who have treated of it since Bodin's time. Hobbes, Locke, Bentham, Austin, and Bryce in England ; from Rousseau to Esmein and Duguit in France ; and Grotius, Pufendorff, Kant, Hegel, Gierke in Germany—all have insisted on the same thing : that the distinguishing mark of the State is the supremacy of its *authority*. Even more commanding than the logic of these, who have reached their conclusion by sifting out the essential quality from the history of the forms of States is the logic of the experience of statesmen : whether autocrats like Cromwell and Bismarck, or democrats like Pruss or Lloyd George, the conclusion is the same : this particular

<sup>1</sup> Brie, *Theorie der Staatenverbindungen*, Stuttgart, 1886.

<sup>2</sup> Bodin, *Six Livres de la République*, Paris, 1576, Book I, Chap. 8. (Although the quotation is from the Latin edition, 1586.)



association of human beings is usually set, by processes so intricate, that volumes are needed to describe them, above all the individuals, groups and social forces it contains : the State is the highest arbiter of right and wrong. This description seems true enough ; but all short descriptions fail to carry with them those parts of their context which are essential to a proper grasp of what is in their author's mind. Aphorisms are usually timeless and spaceless. Thus the men we have named not only agreed on essentials, but violently quarrelled over differentials : over things like the origin of authority, its exact nature, its extent and limits, or, in particular, the relationship between their definition (or better still, somebody else's) and the facts of political life. Our conception of the State will become clearer if we consider the origin of these differences ; we shall find them, first, in exploring the evolution of the word 'State', and second by reflection upon the logical method of abstraction by which the terms and the notions State and Sovereignty have been manipulated.

**The word 'State'.** Not until the sixteenth century did the word State become at all widely current ; and its first use in scientific discussion is attributed to Machiavelli. *The Prince*, written in 1513 begins with the sentence : 'All States and governments which have ever possessed, or, at the present day, exercise, dominion over mankind, have been in their origin or continue to subsist, either as republics or principalities.'<sup>1</sup> Until Machiavelli's time, human co-operation in what we should now call the State-form, was named either by terms borrowed from antiquity (since scholars wrote in Latin and were dominated by the classical past) or others which attempted to crystallize and express the outstanding quality of the association. To the Greeks the term State was unknown : our scholars invented it for them. They used *Polis* and we translate that as City or City-State. But the *Polis* was at first merely a fortified place<sup>2</sup> ; a stronghold ; a place of refuge ; of collective self-preservation against hostile strangers who did not belong. Nor was the fully developed Periclean *Polis*, with its institutions, functions, worship, manners, and the remarkably close and conscious communion of its members with their tenet of direct personal service, anything we may equate with modern government : the emphasis, as classical students have taught us (rightly ?), was upon the enjoyment of rights and community, not upon supremacy and obedience.<sup>3</sup> Nor did *Polis* ever denote any fellowship but one whose

<sup>1</sup> Machiavelli, *Il Principe*. Edited by L. Arthur Burd, Oxford, 1891 : '*Tutti gli stati, tutti i domini che hanno avuto ed hanno imperio sopra gli uomini sono stati e sono repubbliche o principati.*' Are we not entitled to suppose that *stati* and *domini* here are synonyms ?

<sup>2</sup> Myres, *The Political Ideas of the Greeks*, London, 1927, p. 34 ff.

<sup>3</sup> Zimmern, *The Greek Commonwealth*, Oxford, 1911, Part II ; Dickinson, *The Greek View of Life*, London, 1924, p. 67 ff. ; Glotz, *The Greek City and its Institutions*, translated by Mallinson, London, 1929, pp. 128 ff., 141 ff. See also *Cambridge Ancient History*, Vol. V.

members were few enough to dwell together in a small area—this, indeed, being properly recognized as a condition of fellowship. For as Aristotle said : ‘ Ten men are too few for a city ; a hundred thousand are too many.’ When, at the Renaissance, the world became conscious of the legacy of Greece, States had grown so vast in area, and their political institutions were so different from those of classical times, that men could only find the word ‘ city ’ for Polis, ‘ city ’, that is, a town with its communal life, but not a country. If early Rome was called by any other name than *Civitas*, meaning the community of those with full citizen rights and duties, it was *res publica*, that which was a common quality and a common possession of all who belonged to the community of citizens.<sup>1</sup> The full purport of these terms is to be obtained only when we remember that the citizen-community was, as it were, a ‘ political guild ’, a close corporation, living on the exploitation of slaves, the profits from which contributed largely to the glory of that civilization and the possibility of personal political activity, which only citizens enjoyed. For long, indeed, the extension of the Roman possessions was unaccompanied by a corresponding terminology ; then *res publica*, which implied that all who belonged had a common attribute, gave way to *imperium*, which implied qualities possessed by rulers. These terms have not ceased to be used, but they are certainly not identical with ‘ State ’.

The dynamic impulses, the reaching-out of political life in North-West Europe, produced the German term, *Reich*, drawn from *regnum*. France used *regne*, and England *reign*, from the same source. From the outset these terms meant ‘ authority ’, grasp, extent, and, given the historical development of actual authorities, the violent conquest of power, authority was naturally ascribed to Princes. Civic communion, common and equal participation in the employment of authority, as denoted by Polis and Civitas, have certainly little place in this conception. In the Middle Ages *land*, *terre*, and *terra*, became, characteristically of its vital part in men’s lives,<sup>2</sup> the current name, and its deep impression is still evident in German politics and law. But *land* did not include those well-knit City States, and did include regions and provinces of a non-State character. There was, it will be seen, a wide gulf between the notion embodied in *land* and that embodied in *polis* and *city* ; and that in *land* came to mean indiscriminately small and large territories, republics and monarchies. The sense of possession as a personal property is very marked in the uses of the terms *estat* and estate, and follows naturally upon a feudal society. Finally ‘ the State ’, *lo Stato*, was applied in Italy, where the variety of political forms was so wide that the existing terms did not fit

<sup>1</sup> Cf. Homo, *Roman Political Institutions* (1929).

<sup>2</sup> Even as in ancient Greece *demos* meant both country-side and the people of the country-side.

them, especially such various forms as Venice, Florence, and Genoa. The neutral designation 'Stato' arose, qualified by the name of the place to which it was applied—as, *Stato di Venezia*. The exact notion to be conveyed by this term is the subject of some disagreement. Jellinek believes that *lo stato* corresponded, originally, to *status* in later Latin literature,<sup>1</sup> meaning constitution, or order. The great historian of the Renaissance, Burckhardt, holds that *lo stato* meant the rulers and their entourage collectively, and that, later, this term was broadened to connote the 'general being' of a country.<sup>2</sup> That is, *lo stato* is variously interpreted as (a) authority and (b) general social situation, the social relationship within a territory, and more recent research shows that the term was actually used for both meanings in Machiavelli's time in Italy, and a half-century later in other countries. Usage in France and in England in the sixteenth century similarly equated State with supreme authority; but sometimes State denoted simply social institutions. Yet in the middle of the sixteenth century State came more commonly to be used to represent supreme authority. Why was one meaning relegated to comparative oblivion, and the other given a preferential currency?

Something, by now, was common to all these forms of government, and it made the name not inexactly appropriate—strong, sometimes tyrannical, exercise of authority, in countries where people passionately begged relief from unrest and bloody dissension, and where rulers or would-be rulers had cast down the Church from its high political places.

It is significant that the term State was born in the residence of *The Prince*. Nor was it born alone; for, given the conditions, it was

<sup>1</sup> G. Jellinek, *Allgemeine Staatslehre*, Berlin, 1922, p. 133.

<sup>2</sup> Burckhardt, *Culture of the Renaissance*, p. 4: 'Between the two (i.e. the Emperors and the Papacy) lay a multitude of political units—republics and despots—in part of long standing, in part of recent origin, whose existence was founded simply on their power to maintain it. The rulers and their dependents were together called "*lo stato*" and that name afterwards acquired the meaning of the collective existence of a territory.' The whole of the first part of Burckhardt's work, viz., *The State as a Work of Art*, shows, with sufficient detail, that Burckhardt's view is justified, for one can plainly see that in the beginning '*lo stato*' was applied to the tyrants, great and small, and their retainers, of the various Italian political communities, and then came to be applied in the wider sense of a social grouping in which, however, some organ was supreme, whether it was a tyrant, a benevolent despot, or an oligarchy.

The subject is of great interest, and we believe it is possible to show that *stato* or its equivalents like republic and commonwealth, were first used to mean simply an ordered community, and later suffered an imperceptible change into *supreme authority*.

Cf. Dowdall. *The Word 'State'*, in *Law Quarterly Review*, January, 1923, who assembles much material from French, German and English and Latin sources, and his research bears out our generalization. We ourselves have checked independently a large number of Dowdall's references before reading his article. To that we would add two other sources, viz. Viollet, *Institutions Politiques de la France*, 3 vols.; and most important of all, Condorelli, *Per la Storia del nome Stato*, Modena. One should also see quotations from fifteenth- and sixteenth-century documents as in Lucay *Les Secretaries d'État*.

inevitable that there should be a twin-Sovereignty. Machiavelli wrote in 1513, Bodin in 1576.

The term State, and the conception it embodied, were unavoidably moulded and coloured by the generative conditions. It came into use when the State was not of the people but an *estate* of the Crown, and when sovereignty was of kings, even exactly as there had been but lately *seigneurs* lording it over the estates, upon which men obtained their daily bread, when the unity and indisputable supremacy of authority were the very essentials of life. Bodin himself was a member of the moderate political party of France, wanting religious toleration, the closure of dissension and strife, and therefore, Authority supreme, certain, one, and indivisible, yet, be it marked, not unrestrained or institutionally one. Bodin spoke of a *quality* when he spoke of Sovereignty; and qualities are, of course, one and indivisible. But the *government*, that is, the concrete institutions acting in a sovereign capacity, could be any of a number combined in many different ways, and these he sets out in his treatise. To him *état* is the sovereign power; and the actual *état* (that is, the authority) may reside in various bodies, one, many, a few. He is to be praised for a keen, sensible mind: not indiscriminately blamed as is usual. But he is blamed because sovereignty came to be identified with monarchic or despotic authority or, as the jargon goes, monist. The essential oneness of the *quality* was ascribed to particular *institutions*, men, or monarchical forms of rule by others, but that was no fault of Bodin's. Fruitless controversies are only to be avoided over terms, like the State, with a long history when their robe of patches, gathered and stitched fortuitously, is examined, and each patch assigned to its time and purpose.<sup>1</sup>

It is clear that there still remained a very useful meaning in general currency in 'the aggregate situation of the general affairs of the country', like 'commonwealth' or 'republic', common terms in England until the end of the seventeenth century, which closely resemble Jellinek's interpretation of *lo stato* as constitution, or order. This meaning is, at any rate, free from the flavour of absolutism imported into it by court jurists and royalist servants and soldiers. The neutral sense of authority pure and simple, or order, no matter what order, or constitution, whatever its principles and direction or social condition, is a constant element in the evolution of the word State, though, as we have seen, from the sixteenth century onwards the

<sup>1</sup> One other point is worth remark: in Germany the word State was used ambiguously all through the seventeenth century, '*status reipublicae*' was used in discussion, and, when shortened to *ganze status*, i.e. 'whole of the state', it was contrasted with 'state of the court' or 'state of war' or 'state of the exchequer' (familiar enough to English readers), and meant, 'the aggregate situation (*Zustand* which also means state, in the sense of condition) of the general affairs of the country. The term was only used independently when, in the course of the eighteenth century, it was freed from ambiguity by the jurists and political scientists, and came to mean 'the whole political common-life.'

sense of coercive, monarchical authority became predominant. Aware of this, let us turn to the second branch of the discussion.

**Sovereignty.** Bodin's definition of sovereignty has had notable supporters.<sup>1</sup> But supreme authority, one and indivisible, has caused its expounders endless difficulty. Is the State *in fact* the supreme authority, one and indivisible, within its territory? Around this question endless controversy has spun its fine and too frequently useless distinctions. The controversies were caused in most cases by failure to distinguish the *point of view* from which the State was considered. Now the nature of the State has been regarded from two main angles: the legal and the sociological. In the first, which, for historical reasons, preceded, a proposition was created to represent the truth, as near as it is expressible in a short definition, which was then used as a point of departure for deductive argument. A generalization was established from a world of complex facts to represent their essential quality: a type was constructed.

We all have such abstractions in our minds for daily use, for they are exceedingly convenient and save the time otherwise necessary to re-create such serviceable equipment. Democracy, government, nation, god, the press, public opinion, party;—all these are abstractions, mental tools, and the different social sciences, in order to save time, use such general terms and truths presented by the other sciences, or commonly used in popular language and thought. Such abstractions seem to have a clear and definite meaning, especially when personified, as in the 'will of the State'; but they are always incomplete representations of the truth.<sup>2</sup> This makes it easy for a hypercritic to set them up as an Aunt Sally, and have the boisterous pleasure of knocking them down, since a few carefully chosen facts may easily arouse the suspicion that a large part of reality is unaccounted for and unexplained.

By the *sociological* view of the State we mean that which occupies itself with the world of reality, the clashing and harmonizing of actual forces. The political scientist has for his field of exploration, for example, exactly that field which the lawyer has usually left unexplored—the social foundations of the State. Most jurists have taken and still take for granted what the political scientist most questions, namely, the process whereby is created that literary representation of truth—the State—which he can most conveniently handle. The

<sup>1</sup> Bodin, *op. cit.*, Book I, Chap. VIII, and cf. Book II.

<sup>2</sup> Cf. Cassirer, *Substance and Function* (Chicago and London, 1923). See p. 10 ff. on the psychology of abstraction, and, especially p. 15: ' . . . In truth, it will be seen that a series of contents in its conceptual ordering may be arranged according to the most divergent points of view; but only provided that the guiding point of view itself is maintained unaltered in its qualitative peculiarity.' P. 17: 'The concept, however, is not deduced thereby, but presupposed; for when we ascribe to a manifold an order and connexion of elements, we have already presupposed the concept, if not in its complete form yet in its fundamental relation.'

Cf. Vaihinger, *Die Philosophie des Als Ob*, Leipzig, 1918, pp. 28–36, 46–9.

jurist's dogma is the political scientist's problem, and the problem properly handled is able to enrich the dogma. It is, nevertheless, quite obvious that there is no question of the absolute rightness or wrongness of the respective methods, for one is useful for one branch of knowledge, another for a second, and in either of them the accuracy of the definition depends upon the ability and point of view of the student, whether jurist or sociologist: the facts are, objectively, the same for both, the angle of vision and enquiry is different. The terms Sovereignty and State in political thought are like the term Capital in economic thought, employable in several senses, all of which, in their proper context, are perfectly correct.

The term Sovereignty, however, has, unfortunately, caused confusion of late years because people have found it difficult to square the facts of actual political power with the literary theory of supreme authority as handled by the jurists. The nature of the State has been rendered obscure by the controversies because the parties have proceeded from different points, by different roads towards different destinations. It will help us to find the essential truth about the nature of the State if we briefly analyse the controversies.

Confusion has been produced by two classes of thinkers: those who may be called political reformers, and those who may be called the analytical jurists. The political reformers are well represented by Leroy, Duguit, and Laski. They quarrel with Sovereignty, because certain existing institutions are personally distasteful to them, and condemned by their ethics<sup>1</sup>; they criticize 'monism', that is, a single central, coercive governing institution, which they say is what is meant by Sovereignty. Yet when we say Sovereignty, we surely do not mean one man, or a centrally-located group of people, acting as ultimate arbiter: we simply mean supremacy, which may inhere in any one of a wide variety of forms. Liberal thinkers of a former generation were content with the word Decentralization as the counterpart of Centralization: but now Pluralism is opposed to Monism. These thinkers are

<sup>1</sup> Duguit, *Law in the Modern State*, translated by F. and H. Laski, London, 1921, pp. 15, 26 and 29; and there are many other examples. Moreover, Duguit's description of Bodin's theory is so untrue that it can only be called a caricature, e.g., pp. 8, 9 ff. Cf. also Duguit, *Traité de Droit Constitutionnel*, Paris, 1923, Vol. I, Chap. V: H. J. Laski, *A Grammar of Politics*, London, 1926, p. 44: it is a dialectician's presentation of his opponent's case; for none of the thinkers who has dealt with the subject has so considered it—even Austin was more guarded and intelligent. But the third paragraph is more apposite to our present purpose: 'The modern theory of sovereignty is thirdly a theory of political organization. It insists that there must be in every social order some single centre of ultimate reference, some power that is able to resolve disputes by saying a last word that will be obeyed. From the political angle such a view, it will be argued, is of dubious correctness in fact; and it is at least probable that it has dangerous moral consequences. It will be here agreed that it would be of lasting benefit to political science if the whole concept of sovereignty were surrendered. That, in fact, with which we are dealing is power; and what is important in the nature of power is the end it seeks to serve and the way in which it serves that end.'

interested, as reformers, in social reform, to implement which they demand the intervention of the State.<sup>1</sup> The prevailing form of the State, however, is not adapted to produce the results they want : in the centre of the discredited State is the notion of its supreme authority. Therefore they are prompted, unconsciously, to deny the supremacy, the unity and the indivisibility of Sovereignty, and they are denied, in the name of individual, syndical, communal, religious or municipal rights. *Yet these very rights, recognized as morally proper by their protagonists, imply an ordered relationship. In this sense, we all need a State ; and whether we are conscious of the logic of our own claims or not we demand a State.* But what we especially demand is a State made in our own image, and to this we readily ascribe Sovereignty, i.e. supreme and ever 'rightful' power over all elements whether inside or outside our own territories in order to produce and maintain that State, that special social situation. Yet the moment others demand, and perhaps exercise, power in the actual State which we dislike, our private objections are elevated to the dignity of political theory, and erroneously we deny the only thing which can ever help those objections to govern—namely Sovereignty. What we in reality demand, in our dissatisfaction, is what we habitually call a just order of social relations, of behaviour towards each other. We do not stop there in action, though we may do so in thought. In action we go further, and ask—nay, we often behave without a reasoned foresight of the ultimate result of our activity—we ask that that social relationship shall be upheld at a certain point even by force ! Social necessity, the product of our heredity and experience, causes us to insist that the state of things shall be maintained even by force—that the order we demand shall be *really* sovereign. From our conception of that order, and if we are sufficiently powerful (by spiritual means like persuasiveness, personality, charm, or by actual force of arms and coercive exploitation), customary and written regulations arise, called law. We are apt, however, to do battle with the notion of Sovereignty because we desire to overthrow certain specific Kings, Courts, Parliaments, Cabinets, or Social Misery.

This mistake might never have arisen had not systematic political thought been the province mainly of jurists until the Universities established faculties of political science. Men like Austin, Esmein, and Laband (and a host of other German writers) were trained for a profession which purposely spends its life travelling between one formula and another. Their first formula—Sovereignty—was faultless. When they identified this disembodied quality with some one concrete institution of their time they were immediately led in various

<sup>1</sup> We agree broadly with the direction of thought and the diagnosis of social and political defects by these thinkers, but it is at bottom an agreement on morals ; but this agreement does not make Bodin wrong, nor sovereignty necessarily monistic, nor supreme and indivisible authority unnecessary or non-existent .

ways into error.<sup>1</sup> Bodin himself wrote when nascent absolutism was revolutionizing the medieval world, when the need for a central authority in France was producing its juridical justification, a few years only before the Estates should be called together for the last time before the Revolution,<sup>2</sup> and not long before Shakespeare was to meditate upon Order and Degree thus :

The heavens themselves, the planets and this centre  
Observe degree, priority and place,  
Insisture, course, proportion, season, form,  
Office and custom, in all line of order :  
And therefore is the glorious planet Sol,  
In noble eminence enthron'd and spher'd  
Amidst the other : whose medicinable eye  
Corrects the ill aspects of planets evil,  
And posts, like the commandment of a king,  
Sans check, to good and bad : but when the planets  
In evil mixture, to disorder wander. . . .  
. . . . . *frights, changes, horrors,*  
*Divert and crack, rend and deracinate*  
*The unity and married calm of states*  
*Quite from their fixture ! . . .*

Where Bodin sang the Prince, for he *did* believe that Monarchy was the best system for the France of *his time*, Austin and Bentham sang Parliament lately emergent from its contest with the Crown, Esmein *les Chambres* of the Third Republic, and Laband, and many of his colleagues, the German Imperial system of 1871. They were called analytical jurists because they sought out the general qualities of law in their analysis of actual institutions, but they generalized too much from *written* law and the judgements of the law-courts, as though this were all. In the course of forcing their conception to fit the facts before their eyes, they entered into nightmarish controversies whose distracting history is concisely written in the French, German and English constitutional jurisprudence of the last half-century.<sup>3</sup>

<sup>1</sup> Cf., for example, Gierke's attack upon Laband's '*Staatsrecht*' in the article in *Schmoller's Jahrbuch*, 1883.

<sup>2</sup> See Baudrillart, *Jean Bodin et son temps* (Paris, 1853), *Première Partie* ; also Chauviré, *Bodin* ; Barclay, *De Regno* (1600), p. 119 : 'Can the suffering caused by the worst of tyrants be equal to that produced by a single year of insurrection ? State the evils of misgovernment as high as you will, still they are less than those of anarchy.'

On the death of Henry IV civil war again broke out, and the way was open for Richelieu. Cf. *Lavisse et Rambaud, Histoire Générale*, Vol. V. *Les Guerres de Religion*, 1559-1648. Cf. also Reynolds, *Proponents of Limited Monarchy in Sixteen h-Century France : Hotman and Bodin* (1931).

<sup>3</sup> France and Germany suffered more from this battle of the fictions than England, for in those countries legal thought and teaching were and still are more insulated from actual politics than in England. This is mainly due to the early introduction of written codes of law and jurists trained on these written codes, and the existence of written constitutions. Only in the last twenty-five years—I should mark the turn of the tide with Jellinek—have teachers trained in sociology and economics begun to have a refreshing effect upon the study of law in those countries, but there is always a long cultural lag in Universities, since it is a very difficult matter for a teacher to slough off the effect of the teaching of his own teachers.



The Sovereignty, then, of the jurists of the past, is, for the political scientist, a misleading stalking horse.<sup>1</sup> For them it was a proper point of departure, though it would have been more fruitful had the assumptions been regarded as provisional, and, at best, so inexact as to need constant revision in the light of developing reality.<sup>2</sup> Some jurists were wrong, they may always incline towards a narrow definition, and in some the definition will be distorted—but, nevertheless, Sovereignty remains the mark of the State.

One other point: Sovereignty is a quality. Any quality is obviously one and indivisible, as a quality. But it is clear that a quality can inhere in many things, have many embodiments; and that Sovereignty or Supremacy may exist in a thousand different forms and combination of forms. Those who attack the notion of Sovereignty because it is said to be one and indivisible, do not attack the quality—they have on this point not made themselves clear—they attack only the moral foundations of the present distribution of Sovereignty.

So much critical analysis has been necessary to bring out and emphasize the essential character of the State: an association normally supreme within a definite territory and over a complex of activities.

We are primarily interested, however, not in the legal definitions and organization of Sovereignty and the State, but in the social forces which produce them and govern their particular form and substance. Sovereignty is the supreme authority in a territory. The State is the sovereign association. Who then is appointed to represent the State, and how is that appointment actually made? What is the actual extent of power claimed by political institutions in the name of the State, and what actually determines the extent of sovereignty and 'stateness'?

We need no ethical jumping-off ground to answer these questions, no such postulates as that the end of the State is 'the realization of the best self', or 'liberty', or 'the spread of civilization', or 'to make life good'; such postulates and inquiries have their proper time and place; but not here. We seek to lay open the actual nature of this supreme authority.

We recognize, therefore, the distinction between institutions declared by the law to be sovereign—the State of the lawyers; and the real concrete power-relationship in society of which the law is but a part—the State of the political scientist. There is also a distinction between these and the State desired by reformers. It is doubtful

<sup>1</sup> Emerson, *State and Sovereignty in Modern Germany*, New Haven, 1928; Duguit, *Traité de Droit Constitutionnel*, Paris, 1923, Vol. II; Preuss, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Berlin, 1889), p. vi: 'The theory of public law', remarked Preuss, much from the political scientist's standpoint, 'has trapped itself in the web of the concept of sovereignty like a fly in a spider's web.'

<sup>2</sup> Cf. Dickinson, *A Working Theory of Sovereignty*, in *Political Science Quarterly*, December, 1927 and March, 1928; Bryce, *Studies in History and Jurisprudence*, Oxford, 1901, Vol. II, Essay X; Heller, *Die Souveränität*, Berlin and Leipzig, 1927.

whether a coincidence between them has ever existed, and certain that if it has existed it has been for only a short time. For it is plain that the positive statement in law of the nature of the power-relationship can follow but tardily upon the actual movement changes in this relationship: these move so silently and invisibly that the senses of the law are not affected. This actual power-relationship has been called 'meta-juristic',<sup>1</sup> because it precedes the establishment of positive law, the triumphant forces always striving to get their supremacy recognized in the law, while those likely to succumb ask for protection. The most obvious implements of the law are political institutions; but the law is often implemented by other institutions, and politics frequently has to do with conditions not yet stated by the law.

The political struggle is waged for the possession of State power and for the wand of authority, the power for its ultimate uses, and authority for its legitimizing effects. The struggle is for the power to impose an idea of the State on other people, and it is plain that in proportion as the desires are urgent and indispensable, as the life-purpose of the parties is affected (their ethics being already taken for granted and due respect to neighbours already paid) they endeavour to establish their State, cost what it must in pain and sacrifice—the Conservatives hold their State, the Liberals control its progress by definite forms, the Fascists and the Communists attempt to take it by assault. But the State, fundamentally, is the thing, which shall, or shall not be imposed, not that—the Government—which immediately imposes; it is not that which issues orders, it is that which, in the background, compels orders to be issued; not that which regulates—the Government does that—but regulating energy seeking expression: it is a relationship, a situation of social forces, not merely the official registration of such a relationship.

Even as we thus use the term State, we are guilty of thinking of something which is prior to the State in its daily form of governmental institutions. We are simply giving a name to a multitude of social forces which pull in every direction, and determine, by the aggregate balance of their direction, the energy, form and activity of political institutions. The State as we envisage it is this, and not a transcendent abstraction, of the nature of God, ruling the Universe of things living and still. Indeed, Kelsen, the Austrian jurist, who has done much to clarify the relationship between jurisprudence and sociology, has already anticipated our own analogy between the State and political institutions, and God and Theology, and the comparison is exceedingly enlightening. Kelsen denies that the State exists as a force outside the legal order, though, in the history of jurisprudence, it has been

<sup>1</sup> Kelsen, *Der Soziologische und der Juristische Staatsbegriff*, Tübingen, 1922, *passim*; Oppenheimer, *System der Soziologie*; Vol. II, *Der Staat*, p. 309 ff.

taken as the force or institution or person creating laws, and setting legal institutions in motion. There is no way, he says, of knowing the State except through the legal order. The legal rules taken together as a system are the State, and outside them there is nothing except a figment of the observer's mind, curiously like the God who is said by theologians to have created the world, and to manage all that there is in it in every detail and at every moment. But the observation of the way of the world is for all our only means of knowing God, and it is not possible to prove that there is anything outside this.<sup>1</sup>

Thus it is a common fallacy to conceive and postulate a person or a thing as the support or creator or agent of a body of events, a process known as hypostasis, from the Greek *hupo* (beneath) and *stasis* (standing). By this method jurists defined the State as the supreme external maker and applier of the laws, instead of showing that the State was embodied *in them*. But neither they, nor even Kelsen, went further back as they should have done, to the group relationships which caused the laws to spring into being, and which maintain and reform them.

This mental process is common, and politicians and citizens think of the State as a kind of God outside the machine, but existing to give politics and political institutions their impulse. This is liable to lead to serious error, for thus considered the State is vague and abstract, and to such a thing even the most impossible qualities can be and are ascribed. We shall see later that only if it is realized that whatever there is of State is not an entity outside political institutions, but actuating and constituting them, can we arrive at a true understanding of their operation and of the State's nature.

The order in which we are interested, and which portrays the character of the State to the political scientist, is not merely the written legal order, but the effective, active order, which really pertains at a given time, that power-order which actually operates and uses the legal order as its servant and justification. Thus, each institution of Government contains within it some ingredient of the authority of the great association, the State; all the institutions taken together are the State; and people are loyal to the State not uniformly, and as a whole, but as different individuals and groups enjoying or hoping for different satisfactions from different institutions.

**As many States as People.** The mind of every man and woman is pregnant with a State, and every State is different. As each of us looks into the mirror of his own mind through the film called 'State', each sees a different picture, an order in some particulars at least unique . . . State means personal power to some, money to others,

<sup>1</sup> Kelsen, *Allgemeine Staatslehre*, Berlin, 1925, paragraphs 2-6 and p. 76; Kelsen, *op. cit.*

to some war, to some peace; it means charity or savagery; one identifies it with his family, another with a special race; Hegel sees the aura of God in it; Louis XIV saw only the glory of himself '*Le Roi soleil*'; and were we to enumerate all the different visions, we should write a slightly different one for every member of the human race. But where all men and women meet, and where all States are on the same footing, is in the demand for the obedience of others to their special nature. All Gods take on the character of the One God, and it is not the province of the political scientist to judge between these many, but to observe that their political essence is the same. The quality of authority, or recognition that these States are just, is claimed for them; and in the name of authority and under its aegis, men strive for their as yet unborn States against those of others, and for coercion of all kinds to secure supremacy. Coercion or constraint is not only physical as exemplified in banishment, imprisonment, and execution; there is moral suasion, propaganda, education. If we realize this, we shall understand what Treitschke meant by '*der Staat ist Macht*', and what Duguit means by '*l'état est contrainte*'.<sup>1</sup> They did not mean that the State is violence; but that it is made and maintained by a balance of forces.

The essential phenomena which concern the political scientist are, then, the striving of social forces to make their power successful and, if possible, in the form of authority, that is, power legitimized by acceptance, whether as the result of enlightened happy assent or as the result of ignorance or fear. Our discussion so far may be summed up in these words: The State is a territorial association in which social and individual forces of every kind struggle in all their great variety to control its government vested with supreme legitimate power. This conception of the State has been clarified by the work of recent sociologists, among whom Karl Marx, Max Weber,<sup>2</sup> Ratzenhofer,<sup>3</sup> Gumplowicz,<sup>4</sup> and Franz Oppenheimer<sup>5</sup> in Germany and Austria, and Hobhouse<sup>6</sup> in England, and Ward<sup>7</sup> in the U.S.A., have contributed most to its understanding.

<sup>1</sup> Duguit, *Traité*, II, 3: '*Par là, on est ramené à l'élément essentiel de tout état : la plus grande force. Elle peut être matérielle ou morale ; mais, même lorsqu'elle n'est que morale, elle se traduit toujours par une puissance de contrainte.*' Observe how Duguit, after thinking that he has properly vanquished the notion of sovereignty, brings it back in his own way.

<sup>2</sup> M. Weber, *Politik als Beruf*, München und Leipzig, 1926, *passim*; M. Weber, *Grundriss der Sozialökonomik : Part III, Wirtschaft und Gesellschaft*.

<sup>3</sup> Ratzenhofer, *Wesen und Zweck der Politik*, 1893.

<sup>4</sup> Gumplowicz, *Grundriss der Soziologie*, Innsbruck, 1926; *Soziologie und Politik ; Die Soziologische Staatsidee*, Innsbruck, 1902.

<sup>5</sup> Oppenheimer, *op. cit.*

<sup>6</sup> Hobhouse, *The Elements of Social Justice*, London, 1922 Hobhouse, *Social Development*, London, 1924, Chaps. I, II, III, IV, XI.

<sup>7</sup> Ward, *Dynamic Sociology*, New York, 1907, II, 212 ff.

**Sovereign and Subject : An Improper Contrast.** Wherever the influence of the sociologists has not yet become effective the discussion of the nature of the State is always spoilt by the unfortunate contrast (explicit or implicit) of Sovereign and Subject, or of Governors and Governed. This seems to me to be either the product of habit, the use of conceptions derived from the ideology of the French Revolution, and the large legacy of economic and social privileges enjoyed by certain families and classes in the modern State. Every social injustice causes a revival of these terms and their mental stereotypes, and both defenders and attackers of the *status quo* use them. It will shed a light on the nature of our problem if we recall that the view of the State as composed of subjects did not correspond with the Greek ideas of the *polis* or the Roman ideas of the *civitas*, and that only from Bodin's time are terms used popularly to denote the idea that the State is based on the subjection of some people by others. Now, history shows us clearly and certainly that all States were *founded* on subjection ; and history does not stop at a time remote from us, but continues to our own day. There is still a large amount of subjection, attack it or justify it how we may. Nevertheless, the crude contrast of Sovereign and Subject, Governors and Governed, is not true of the higher civilizations of to-day ; and it is an error of vital dimensions to be blinded to the large and permanent pillars of commonwealth by the unfortunate and condemnable amount of existing and continuing exploitation of the weak.

The truer and the more useful conception is that which is derived by going a little further along the path indicated by sociology. Government is simply the manager of that supply of authority which is necessary to support the reciprocal claims of social groups upon each other. That is, it is an intermediary rather than a governor and governmental institutions are 'the first servant of the State', in Frederick the Great's celebrated phrase, rather than the servants of their own will. Indeed, the literature of jurisprudence and political theory begins to show the signs of such a conception. We all know Duguit's famous phrase that the State is a 'public service corporation',<sup>1</sup> and it is full of vital meaning. Then there is Hauriou's phrase that the State is the 'institution of institutions', by which he means that the State stands in a mediatory, instrumental relation to other institutions of society.

In England, Ernest Barker has finely said, that 'the identity of the State resides not in any single transcendent personality but in a *single organizing idea* permeating simultaneously and permanently a number of personalities. As for the State, so for all fellowships : there may be oneness without any transcendent one.' And again : 'we may be content to speak of associations as schemes in which real and individual

<sup>1</sup> Duguit, *Law in the Modern State*, *passim*.

persons and will are related to another by means of a common and organizing idea.<sup>1</sup>

These definitions are important, but we must remember that the common and organizing idea is only a casual and changing product of the rough and tumble of the daily life of the units which may become organized, and that the organizing impulse is not outside but inside those units. Modern German jurists, approaching their work sociologically, come nearer to our conception of the identifying mark of the State. Eugen Ehrlich, speaking of that attitude towards law coupled most usually with the work of Gierke, namely the *Genossenschafts theorie* (the Theory of Groups within the State), says that <sup>2</sup> 'according to the idea of *Genossenschaftsrecht*, law is an organization ; in other words, a rule which assigns to every member of the *Genossenschaft* his place and duties, his superordination and subordination in the community'. That is a truer view than the Sovereign-Subject conception : truer simply as the observation of existing facts, not as a lever for what may or may not be desirable reforms. Oppenheimer's theory that the State is a 'framework group' (*Rahmen-gruppe*), is important for its emphasis that the State is an order containing groups, which, in the particular power-relationship, maintain that particular frame.

We come to the main result of the discussion ; that the State is simply an order in which there is superordination and subordination of individuals and groups *to each other*, and that this order, obtained and maintained by social power, operates in the name, and with the title, of the supreme authority. It is vitally important to notice that the State is not a sovereign to some abstract being called a subject, but is simply the most extensive complex of institutions in which is heard, determined, and normally executed, the demand for the authority and submission of persons and associations towards each other. At any moment, I may be sovereign, at any moment subject ; and, at every moment, I am alternately, and at the same time, one and the other in many different connexions. From me radiate numerous sovereignties, and upon me converge as many demands for subjection. Examples leap to the mind : one borough must pay another money to equalize financial burdens caused by the existence of national minimum of services ; I must pay for the education of other people's children, and *vice versa* other people pay for mine ; we pay for, and receive, in various degrees the benefits of social insurance, all benefit differently and contribute differently towards the State's object in daylight saving, and so on. And, substantially, the nature of political institutions is to support me by the recognized instruments when I am sovereign, to support those who make recognized claims on me when I am subject. Between

<sup>1</sup> Barker, *The Discredited State*, *Political Quarterly*, February, 1915, pp. 111 ff.

<sup>2</sup> Ehrlich, *Freie Rechtsfindung und Freie Rechtswissenschaft*, 1903.

all of us as citizens stands the institution, to concentrate, to man, and apply, the pressure of power ; but institutions do not create the fuel and the energy for this pressure. They are simply arrangements, and their dynamic power and scope are constituted by the relative strength of emergent social forces. This, however, is not to forget that since institutions are made of men, their own psychic and physiological nature necessarily affects the working of institutions, and therefore the nature of the State.

It is time, in short, to adapt Joseph de Maistre's famous saying to the real political conditions of our own day : *Il faut prêter sans cesse aux peuples les bienfaits de l'autorité et aux rois les bienfaits de la liberté.*' It is not in the old sense that subjects have to learn the value of authority, and kings the value of liberty : for we are all, without exception, at once kings and subjects.

Yet the demands that we make upon each other, in the name of the State, are not in degree or in kind the same in all States. They vary widely, and this quality of 'Stateness', or management by political institutions, differs from country to country, so much so, indeed, that one is often tempted to deny the existence of 'the State in general', and to talk only of States.<sup>1</sup> Though they have a common quality, political thought cannot but be impoverished by the habit of using the term without 'a local habitation and a name'. Why 'Stateness' differs from State to State, will become plain as we compare the institutions of each country.

**Rights and Allegiance.** If we regard the State as an order of human relationships of the nature described, we shall have a better clue to the understanding of the nature of Rights and Allegiance than that afforded by the Natural Rights school of thought, for that was almost exclusively a school of revolt and reform. The claim which makes a place for itself in the State is 'legitimized' by that acceptance (whether by way of persuasion or forcible imposition), and only by that : and by that fact it becomes a right. We are not concerned here whether the means adopted to secure that legitimization are moral or not, or whether the claim itself is consistent with our ethics, or whether the people who, consciously or negligently, accept the claim are morally right or wrong. The means, in some form or another, must acquire a control over the law-making and administering institutions sufficient for the purpose. When that right, however, is to be validated by actually being administered, that is by being made actually to affect the behaviour of persons and the disposition of things, a duty is somewhere created. It is an ill right that blows nobody good ; but the good cannot be produced simply by the operation of a political institution upon nothing. Energy cannot be produced by Governments any more than by any other machine. The State can only transform

<sup>1</sup> Meinecke, *Die Idee der Staateräson*, München und Berlin, 1924, p. 23.

energy from the less to the more useful form. As the transforming agency which the State (an association with governmental mechanism) essentially is, it must obtain the raw material of its rights from the inhabitants, or in other words it must systematize and distribute duties among them, for these are the indispensable sources of its rights. It cannot guarantee a minimum wage without imposing duties upon employers, or universal education without compelling attendance and raising revenue. As a channel, as the conductor, or in Stammler's phrase, the 'social manager', the State can but liberate that energy in one direction which it taps in another. Naturally much of the value of the State will depend upon whether it is so organized as to do this without friction, waste, unnecessary pain. Here, with the proper qualification, it follows the rules of the machine, and in the discussion of the conditions of State Activity we pursue the analogy.

The general habit of placing the State on one side and subjects on the other, and of ascribing the source of the former to some transcendence that defies exact description, makes it seem as though the State possesses magical powers capable of being tapped as an inexhaustible reservoir of rights. This view, unfortunately for science, and for the illusions of many to whom it is a gospel of reformatory hope, still persists in many quarters, and the process of hypostasis which we before described has also lent colour to such illusions. When rights were demanded it was from the State or Government. Now, it was proper to direct the demand to this centre : it is to the State that we, *in the first place*, make our demands, and it is the State that will implement them. But we must understand what lies in the background of government : for it is to the forces there resident that we ultimately appeal. We appeal to nothing more or less magical than our neighbours and ourselves. That is to-day sufficiently prosaic and mediocre, but with good management it may reach a high level.

The State's majesty is always as promising and as limited as our own. The literature of political thought is covered, to the obscurity of real issues, by demands for rights from the State. Some are acceded to and acquitted : others when acceded to have been worth no more than the paper upon which the promise has been written ; and others, again, have been refused but have become actually operative. For the demand for rights from the State has ever been a demand for duties by other citizens, and there, at that point, is the real and serious tension to which political institutions are subject. For these institutions can indict and promulgate a gift of rights, but their power stops at that : unless there are those willing to accept and fulfil the implied obligations or weak enough to be compelled. Of every State of which we have adequate historical records we can show that this is true, and the section on State activity will show this in detail, and the complete demonstration is to be seen as we unfold the description of



constitutions, problems of territorial organization, of representative government, of officials in the modern State, and many other institutions. We can easily count more than half a hundred declarations of rights, but the declarations of duties are much fewer.<sup>1</sup> The former are, of course, merely the result of centuries of absolutist history, necessarily followed by systematic written codes of revolt, the latter come tardily as constitutional recognition of the true source of rights. It is urgent that we should no longer be blinded by the facts of the Absolute State or the predictions of the Servile State. In the State whose nature is management or instrumentality, in the Ministrant State of to-day, the energizing factor of our rights is duty, an inescapable price. And we shall be talking not of the State here and now as built of men and women, but of Cloud Cuckoo Land, if we imagine that by uttering the word State we shall be lifted out of the realm of cause and effect, into one where it is unnecessary to set off satisfactions and payments against each other before being able to count our net gain. The State cannot give more than it takes : what it gives in Rights, it must take in Duties. All the rest is commentary.

**Why Men are Loyal.** Regarded in the light of our conclusions about the nature of the State we can see clearly the reasons why men give it their allegiance. Each has his own reasons, and these are in detail as varied as all the possible variety of interests which engage the mind and activities of men. They all issue in a variety of demands, the most common of which are Order or Freedom, or Social Justice and such-like general aspirations, but when we inquire more closely into the substance of these demands we find that each voice that utters them has its own modulation : and in that modulation lies the personal reason for allegiance to the greater whole. But it must not be believed that because allegiance is in the end to one's self alone that strife and wounding are the necessary consequences, for we may serve one disposition rather than another, one appetite rather than another, those which mean my neighbours' good as well as my own, those which produce peace and contentment for our country and the world as well as within our own home, those which serve the public health and the distribution of the finest products of man's mind and body, as well as those which minister to our own body's cleanliness, health and gratification. But all these are the interests of separate men and women, and the interests of men expressed in their associations, and their allegiance to the larger association, are derivations from this source. The sublime and the base, the voices which seem to speak with the tongues of angels, and those which cause aversion and shame—all in their amazing diversity and personal integration, inform man's pur-

<sup>1</sup> One is the second part of the German Constitution of 1919 and is discussed at length in Book III, Chap. I. The second is the declaration of duties in the French Constitution of 1793. This is not to count subsequent declarations in French history.

poses, and issue somewhere in their need for the State, and the need prompts the loyalty. Some are disruptive, and would bring about a state of open war; others soften such antagonisms and enable murder, violence and expropriation to be accomplished with courtesy, and others enable vast territories to be maintained in a state of peace and an approach to economic equality, where a fine balance is maintained among duties and rights so that men are able to pursue, on the whole, what most wins their contented acquiescence.<sup>1</sup>

However rebellious we are against authority we are all prepared to accept the State on our own terms; as for example, the Fascists and Communists, and in Germany, the National Socialists. Ignorance and inertia, apathy, sheer mysticality and superstition are for many people the angle from which their reasons for allegiance may be viewed; to many it appears that without this vaguely-sensed institution terrible things would happen and common behaviour lose its sanctions. Their loyalty to other things makes them loyal to the State; because they love their family they need the State to shelter its members from danger, or to educate them, or to find them work; they are afraid of dismissal from their jobs if they air their anarchist theories, so they appear to accept the State; the insecurity of the economic system in which they live makes them inclined to political institutions which seek to render that insecurity a less fearful prospect, or millions of them fear to be overcome and ruled by bodies of people with other languages, physiological constitutions, manners and culture, or desire to fix their own way of life upon other racial groups. Some, like Plato, Hegel and Rodbertus, are congenital State-building animals—poets of the State. And millions, like that celebrated lady, Mrs. Sarah Trimmer, read their peculiar notion of God into the State. All these things, and many more, enter the common man's loyalty to the State, that loyalty which means the readiness to fulfil the duties laid upon him by political institutions.<sup>2</sup> Nor must we persist in Rousseau's error: that every person gets from the State the equal of what he gives. This is quite untrue, for had we the power to extract what we are obliged to give, our tastes and dispositions are yet too different for equality; nor are all of equal power, so that the weak are exploited.

<sup>1</sup> Cf. Hobhouse, *Social Development*, the evolutionary chapters of which lead ultimately to the notion of social harmony.

<sup>2</sup> P. L. Ford (Editor), *Pamphlets on the Constitution of the United States*, Brooklyn, 1888, p. 63: 'It is absurd for a man to oppose the adoption of the constitution because he thinks some part of it defective or exceptionable. Let every man be at liberty to expunge what he judges to be exceptionable, and not a syllable of the constitution will survive the scrutiny. . . . I have no doubt that every member of the late convention has exceptions to some part of the system proposed. Their constituents have the same, and if every objection must be removed, before we have a national government, the Lord have mercy on us. Perfection is not the lot of humanity. Instead of censuring the small faults of the constitution, I am astonished that so many clashing interests have been reconciled, and so many sacrifices made to the general interest.' See also p. 99.

As far as we can see, something of a State would exist without written regulations, institutions, and the machinery of enforcement, but in the present state of human nature it would be too dangerous for society to try to do without them, and some of the reasons why will be found in the section on Politics and Economics and on Constitutions, Political Parties and on Civil Services. Even to-day, with so much upon which to ground a common rule, the State as 'social manager' with 'ruling power' only, and clothed in the garb of authority, sustains itself only by virtue of all its educative operations which begin to influence us as soon as we are born, and which whine and screech with exceptional vitality when it is in danger. Indeed, it was impossible to run a large State peacefully before transport and communication made it possible for this teaching—some of it of a very forcible kind—to be conducted. The State is now part of our social inheritance and it is an inheritance which is challenged every day by those who offer alternatives to the particular form and purposes of the State. Many are weakly loyal because they reserve their loyalty for an international authority; others prefer regional or vocational bodies to the claims of their contemporary State; the Anarchist denies the need for any order other than that derived from a sense of fellowship. If one powerful teaching body were able to operate unhindered and uncontradicted for a couple of generations with an attractive creed, effective forms as yet inconceivable could be provided for the State. In fact those political institutions which are especially directed to the purpose, can afford to lose no opportunity, and in practice do not lose any, to assert the State's importance and to suppress all activities, which, in the words of the English Law of Seditious Libel, intend

to bring into hatred or contempt, or to excite disaffection against the persons of, His Majesty, his heirs or successors, or the Government and Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State, by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.' <sup>1</sup>

The State, indeed, has powerful rivals within its own body, *Staatsgefährlich*, as the Germans say, 'State-dangerous', and when it is liberal to its rivals, it can be so only if it has a reserve of power which it can turn against disruption.<sup>2</sup>

<sup>1</sup> Stephen's *Digest of the Criminal Law*, Article 97.

<sup>2</sup> E.g. Frederick the Great showed in *The Anti-Machiavell* that the State of his time could be tolerant because standing armies had been established, and these could, in the last resort, prevent the practical subversive effect of doctrine. Cf. also Adam Smith, *The Wealth of Nations*. Smith's library contained Frederick the Great's work; see Bonar, *Adam Smith's Library*.

**The State made to Measure.** We have as much as said that the State is created only in proportion as it is desired, though that desire is of a multiform nature. The reverse is also true. Where the State is not believed useful it is not created. This is no more than the ordinary economical conduct of human beings, who, on the whole, try to avoid any expenditure of energy which is not likely to return a surplus of satisfaction. If individuals and groups can find their satisfaction without creating political institutions they do so, and we need not be surprised at this wherever we find an example of it. There are associations in each country which offer men satisfactions which they do not believe the State can give. If economic organizations autonomously give them their daily bread, *ubi bene ibi patria*, and, since where there is a sphere of happiness there is a fatherland, political institutions have lost a potential votary. The demands for the so-called 'de-politicization' of industry, the separation of Church and State, private education, are ubiquitous. Religious consolation, family-life, spiritual companionship, the joys of making and appreciating works of art, much of

' that content surpassing wealth  
The sage in meditation found,  
And walked with inward glory crowned '

does not need the sponsorship of political authority whose ministrations may, indeed, trample out the subtlest and most refined felicities. But we must be careful where we draw the line between the useful and the wasteful entry of political institutions, and so far *a priori*, absolute judgements where this line should be drawn have been refuted by events. In any case, it is erroneous to approach the subject of government with a belief that it is all important, that it can solve all ills, that its authority has no limits in actual power. As we have said, there are many sources of human joy, many possibilities of spiritual development which do not and need not come within the purview of political institutions to yield their best fruits.

**Constitutions and Ethics.** The relationship of individual and associative impulses and arrangements within a territory, issues in some more or less generally accepted rules which are of special importance to the political scientist. They are the rules which announce the recognized manner in which political activity shall be carried on. Or, in words which better remind us of the essential character of the State: they are the recognized authoritative manner in which the struggle to make powers practically valid and legitimate shall be prosecuted. The rules are collectively called Constitutions, or Constitutional Laws, and a closer study is made of them, in the chapter on Constitutions.<sup>1</sup> But here two things may be said.

<sup>1</sup> Compare Part III, Chap. VII *infra*.

The first is that there is a clearly observable tendency from the seventeenth century at least, in Western States, to write down these rules of behaviour in ever more detailed, comprehensive fashion ; and to attempt to establish them on as permanent a basis as possible. The second truth is this, that not all constitutional rules are written, or expressly authorized by their inclusion in the laws. Customary activities and institutions grow up outside the written constitution and form the 'unwritten' constitution, and sometimes these are so far from recognition that they are even denied the quasi-authority of 'unwritten' constitution, and they are called 'invisible government'. Many indispensable institutions grow up thus unseen by the eyes of the law. Hardly any one country, for example, recognizes the Party System as part of its constitution. For it is in such institutions that real but ugly forces of political activity work and burn at white heat. In these *arcana* reside the disgusting and the shameful instruments wherewith to attract and keep men dynamically convinced that such and such a State is most desirable. 'Every man has his price,'<sup>1</sup> 'Violence is good when it is timely, surgical and successful,'<sup>2</sup> 'You must not forget that force and austere justice are the goodness of kings. You confound the goodness of kings too much with the goodness of individuals' ; or again, 'Astounding is the power of words over men !'<sup>3</sup> 'First I grab ; and then I seek out a jurist to find legal grounds for my behaviour.'<sup>4</sup> These cynical acids etch the paths the statesman must tread.<sup>5</sup> They are indispensable now as in Machiavelli's day, and even Trotsky had, in spite of himself, to admit the necessity of medals and decorations. We may well ask, indeed, whether the ambit of barbarity has been more than a little diminished in the passage of centuries, for barbarity itself is certainly rife, and we, the war-generation, are best able to say that when the noble appeal fails and leaves the indispensable task yet to be accomplished, the road is trod whether or no the fact is publicly admitted, or whether or not it disgusts the Statesman. We, as political scientists, may only regard such behaviour from the standpoint of appropriateness for its purpose and we cannot ask whether it is moral or immoral, whether the supreme good sought is to us desirable or not. As Croce says : 'The truth remains : if a thing appears necessary in the highest clarity of your ethical consciousness, it can be neither breach of faith nor murder nor any other crime.'<sup>6</sup>

We are always being faced with the question whether we shall resort to cunning, fraud or force in the course of our life and continually we ask how far violence is legitimate ? Political life forces the

<sup>1</sup> Walpole.<sup>2</sup> Mussolini.<sup>3</sup> Napoleon.<sup>4</sup> Frederick the Great.<sup>5</sup> Meinecke, *op. cit.* In this work, which deals with the growth of the idea of *raison d'état*, there are numerous examples of such maxims as we have just quoted.<sup>6</sup> Croce, *Grundlagen der Politik* (Elementi di Politici), p. 6.

question upon us daily.<sup>1</sup> On the side of the rulers, history records thousands of acts done for *raison d'état*, and justifiable in no other court than that; on the side of the ruled there is the equivalent of *raison d'état*, and we might call it *raison de révolution*.<sup>2</sup> To the revolutionist the revolution is holier than the State, for while the beginning of the revolution is the downfall of one State, its end is the creation of another, and in the name of the coming State the acts of revolution are sanctified. The real question which faces the political scientist is, then, can the existing State, which is said to be worth so much more or so much less than the new, be altered or maintained, given the conditions of the time and place, with less of force, cunning, fraud, and more of the passions we call noble, good and virtuous? It is a question of balance, and we answer it in terms of behaviour every day. No State even when ruled by saints, has been or is maintained without bloodshed, and thousands of acts of physical violence, and as many more of spiritual duress. None was ever overturned without them. It is perhaps from a consciousness of these truths that Burke urged that we should not inquire into the foundations of government.<sup>3</sup> Democracy itself, which to-day claims its victims, was nowhere established without violence, nor were its precursors maintained without it.

The Statesman, and, in fact, the ordinary citizen, whether conscious of it or not, are constantly weighing up whether on the whole such and such an object is worth such and such a price. Cromwell the private citizen was no other than Cromwell the Protector; but in the new situation his qualities were obliged to react to quite a different set of circumstances, so that the belauded rebel of one year was reviled as the despot of the next. Indeed, every rebel is a potential despot, and *vice versa*. No phrase is as common as this, that power has a corrupting influence on those who wield it, and the thought has had important effects in political practice.<sup>4</sup> This simply expresses the observed truth that those who attain office seem to behave less nobly than when they were critics or private citizens. The corruption, however, is less in the man than in the nature of the office: it exists before the holder takes his chair. I find it quite impossible to accept the trend of argument in Janet, that private morality is ever better than

<sup>1</sup> Compare Janet, *Histoire de la Science Politique*, Paris. Introduction: '*Rapports de la Morale et de la Politique*.'

<sup>2</sup> To be found in such works as Du Plessis Mornay: *Vindiciae contra Tyrannos*; D'Estienne De La Boetie, *Discours de la Serritude Volontaire*, *Oeuvres complètes*, Bordeaux and Paris, 1892, pp. 1-61; L. Trotsky, *The Defence of Terrorism*, London, 1921; and other famous pamphlets; see also G. Le Bon, *The Psychology of Revolution*, translated by B. Miall, London, 1913.

<sup>3</sup> Morley, *Edmund Burke*, p. 39: 'Provided that there was peace, that is to say, general happiness and content, Burke felt that a too great inquisitiveness as to its foundations was not only idle, but mischievous and cruel.'

<sup>4</sup> For example, in the establishment of the theory of the separation of powers.

public. I think that this reposes upon faulty introspection, a foggy observation of other people, and a fatal want of understanding of the nature of governmental activity. Which of us is not guilty of dishonourable activity? Which of us has not lied, stolen, and acted aggressively? Is there a single Church without guilt? Further, we have transferred to government the nastiest duties. Would we not all become spies, intriguers, and at certain points murderers, if we, individually, were compelled to defend ourselves against theft, infectious diseases, broken contracts, industrial exploitation, social privilege and crime? But this is exactly what we ask Government to do for us. For it is at the political seat of power that we discover most human suppliants and their weaknesses; that indeed is why it was erected, so that in their need men may find a support. We have already said that no remedy is substantial till shoulders are found to bear its burden. The obligation of this discovery is the statesman's and it leads him not infrequently along insalubrious paths. Political power, in short, has its special compulsions, and all who wield it must fulfil them or fall. The outskirts and the background of written constitutions are alive with motives and passions we hardly dare admit to ourselves, and unless they are added to our account the literary theory of a constitution is no more than a lie. It has been said that the real rulers of society are undiscoverable: it is time that we ceased to believe this: for obviously, whether it is true or not in any specific case, depends upon how and where you look.

The various parts of the constitution, written or unwritten, visible or invisible, are political institutions. Those which we shall try to describe and understand are limited only to four great countries, Great Britain, France, Germany, and the U.S.A., and to the occasional instances occurring in the British Dominions and European States other than those already mentioned. In all cases they are countries where the democratic form of constitution is in operation. What we mean by democratic, its merits and its demerits, and history, we treat of in an ensuing chapter. But it must not be forgotten that the democratic State, even the constitutional State, has a history of hardly more than a century: and were we to limit the name to those countries alone which have universal franchise, then we should say that the world has hardly had more than a half-century's experience of a democratic State. We write, too, at a time when there are strong theoretical and practical challenges to the democratic system in Italy and Russia. Since this is so we shall be all the more in a frame of mind not to accept democratic government as a dispensation to be placed beyond the range of critical inquiry. It is a phenomenon like all others, to be questioned, and, if possible, understood. For good government is our primary concern, and democratic government must take the reputation it deserves on its proven or provable merits.

**The Inter-Relativity of Institutions.** All political institutions are relative to each other, and as a system, they are relative to the special country in which they operate. We have said enough about the character of the State not to need to repeat that political institutions are instrumental or ministrant. They are therefore ruled by their purpose, and any change in purpose must in the long run mean a change in them. There is and can be no real autonomy of any institution in a system. All are related, more or less closely, through their broad purpose, the creation of a social utility. This has a vital bearing, as we shall see, upon such important problems as the Separation of Powers and Central and Local Government (including Federal Government): but it is effective throughout the whole realm of politics. It is clear that the importance of every institution is measured by the general conception of the desirable State by statesmen and people; and most usually the struggle over institutions—e.g. the political levy by Trade Unions, or the Civil Servants' right to strike, or Proportional Representation, or Economic Parliaments, Second Chambers—the controversy about these is also controversy about the general nature of the State.<sup>1</sup> As in Biology, so in Politics—there is a 'balance of Nature', or, in other words, all existing elements are so interrelated, that if any single one is changed, even in the smallest particular, a change follows, causally, in all other forms. Hence, as you cannot introduce rabbits into a country without affecting its flora and other fauna, so no single institution can be introduced or withdrawn in a governmental system without producing corresponding adjustments elsewhere. Behind it all is a question of values ethical, economical, and many others, and this again causes a misuse of political terms which the student must ever be on his guard to rescue from their evaluative or, as it is called, tendencious use. The death of a man is, when the government causes it, an execution, when a citizen, murder; the peace-loving are in one aspect pacifists, in another defeatists; the internationalist becomes the anti-nationalist according to the speaker's political values; and who has not conjured a dozen times a day with the words constitutional and unconstitutional? The political scientist more than any other has to borrow his terms from a region where quantitative exactness is unknown. He must remember that he may have a privately conceived State

<sup>1</sup> E.g. Bismarck, *Recollections and Reminiscences* (Tauchnitz), I, 38. We can quite believe in Bismarck's sincerity when he said: 'The interests of the state alone have guided me, and it has been a calumny when publicists, even well-meaning, have accused me of having even advocated an aristocratic system. I have never regarded birth as a substitute for want of ability; whenever I have come forward on behalf of landed property, it has not been in the interests of proprietors of my own class, but because I see in the decline of agriculture one of the greatest dangers to our permanence as a state.' Napoleon could do no other than convert France into a great barracks, nor Cromwell than abolish the Rump, and we shall see that the 'inalienable' rights for which men have fought till death, have not been invariably inalienable.



in his mind to which all his terms relate, and he must endeavour to reduce them to neutrality though not to meaninglessness.

That institutions are relative to time and place need not be explained at length. Rohan, Bodin, Montesquieu, De Tocqueville and modern sociology have been sufficiently insistent upon this, and we shall have more to say in the discussion of Politics and Economics, which directly follows. Suffice it to say here that the location and nature of the territory in which the State is enclosed are everywhere inseparably connected with distinctive quality of the institutions. A character and manner permeate them all, so that the transplantation of an institution in its exact native form is quite impossible. But it does not follow that adaptations are equally impossible. Every country has much to learn both from the successes and the failures of others.

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**Nationality.** A peculiar integrating force in modern civilization is that consciousness of kind which we call Nationality. It is true that people appeal to others in the name of the Nation, that is, the collective whole, and Patriotism, for selfish purposes, and use the terms, often in good faith, when they are simply instruments for sectional, class and parochial purposes, and yet there is a recognition of duty, courtesy and peacefulness, for itself alone, and directly emanating from a consciousness of kind, a spontaneous feeling of kinship. It issues from many factors : a common language, a common cultural inheritance, common racial characteristics, many years of exclusive possession of certain territories. It is expressed more as a defensive and offensive force against other nations or backward tribes, than as a general self-sacrificial attitude at home : *and yet*, its power does soften and inhibit the potential violence of man to man, spurs the citizen to public devotion and surrender, and clothes certain duties and rights with the quality of spontaneous naturalness. In our own time Nationality is cultivated, worshipped of set purpose, for it is seen that without it, the egoisms in society would come the nearer to breaking society to pieces.<sup>1</sup>

**Material Environment.** Pioneers like Bodin and Montesquieu have accustomed us to think of government as controlled by geographical situation, climate and race. We will have much occasion to observe the action and reaction of human qualities and material environment. Since the early writers other elements have been conjured up by men's analytical and inventive power, and these have a compelling effect upon political behaviour and institutions. Men

<sup>1</sup> Cf. Hertz (and others), *Nation und Nationalität, Jahrbuch für Soziologie*, 1927 ; Van Gennep, *Traité comparatif des Nationalités* ; Herbert, *Nationality* ; Renan, *Qu'est ce que qu'une Nation* ; Zimmern, *Nationality and Government* ; Wallas, *Our Social Heritage*.

could deny them if they wished : but the loss in human power, personal vigour and longevity would be very great, and men are at present not disposed to deny themselves their benefits. Such are (1) the use of steam and electric energy, which adds force and speed to all human contacts, and produces abundance and friction ; (2) the highly developed understanding of the technical nature of all services which tends always to reduce the rôle played by appeals to tradition and vague moral enthusiasm as the sanction of political controversies, and increases correspondingly the part played by the impartial technicians, and settles problems as of itself. Such inventions, also, (3) as flight by air and navigation beneath the sea, change the former offensive and defensive relations, and have their effect, as we shall see, upon national cohesion and discipline.

Here let us insist only upon one thing, the demands which the increase of human energy makes upon the need for government.

In the centre of modern life, there stands this awful truth : that, as compared with the eighteenth century, man is now able to do many times as much good and many times as much harm to his fellows ; for whereas the only source of energy, then, was man-power or horse-power, we have now the mighty forces given by coal, oil, and steam, ingeniously utilized in machines. It has been roughly computed that, on the average, we have each at our command some 10 horse-power of energy. That is a tremendous and appalling fact, for in proportion to our power for good or evil, must necessarily be the power and intervention of government. How much men realize the need to govern themselves in the use of these potentialities is seen by the fact that they are preparing to disarm lest they be tempted to disagree and kill each other.

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We have seen, then, that political institutions operate as the expression of a particular part of human life ; and that the essential nature of this part of life is the social struggle for and the subsequent use of the supreme power within a territory. And in default of words less obscured by history we call this supreme power the State, and its supremacy, Sovereignty.

Before we can embark upon the study of political institutions separately we are faced with two problems whose discussion is unavoidable : the relationship between Politics and Economic institutions and processes, and the second, the conditions of State activity. Both of these are so fundamental to all the discussion which follows that if their consideration were not gathered in separate sections, unsystematic reiteration in each chapter would be necessary. The chapters which follow them are, in turn, the separate development and analysis of their implications.

## CHAPTER II

### POLITICS AND ECONOMICS

NO study of modern government can avoid assigning a special place to the interrelationship between Economics and Politics, and the reason will become clear, I hope, in this chapter. Yet an apology is necessary for giving such a distinction to Economics and not to Religion. I know the great influence of Religion upon Politics : its demands and inhibitions upon our nature, its formative power over men and groups, and thus upon nations. The great Churches of the world have not entirely lost their effective virtue. But the main spiritual leadership has passed into other hands, and men pick up their beliefs when and where they can. Political institutions themselves have inherited much that was formerly the Churches' pride, and the world covets economic welfare, and is therefore ruled, as never before, by economic considerations and institutions. Therefore, apologetically and grieved, I give Economics the first place.

The economic aspect of man's life is that which is concerned with the production of wealth, or material welfare. There is much dispute over the boundary-line between material and non-material welfare,<sup>1</sup> and since that matter cannot be discussed here for want of space, we must take economics to mean that part of human behaviour which centres upon the acquisition of an income. Formally, this is a matter of money, but substantially it is a question of acquiring goods and services. The complex of problems surrounding this core, the acquisition of an income, constitutes the field of economic inquiry, and the political scientist is obliged to observe and analyse the relationship between the way men organize themselves to acquire an income, and their organization of social institutions to exert legitimate force over all others.

The influence of economic processes upon political life was first explored with greatest persistence and effect by Karl Marx. His eminent

<sup>1</sup> See Keynes, *The Scope and Method of Political Economy*, London, 1904 ; Cannan, *Wealth* (2nd Edition), London, 1924, Chap. I ; Pigou, *The Economics of Welfare*, London, 1929, Chap. I.

precursors in such inquiry were Aristotle, the Physiocrats, and Adam Smith. The first could not escape it, for the whole polity of the City-State depended upon slave-labour.<sup>1</sup> The Physiocrats and Adam Smith were the pioneers of that long line of men marching down into our own day who preached the freedom of economic enterprise from governmental regulation. They were economists first and political scientists afterwards, and apart from a few shrewd remarks scattered among their works they were silent on the influence of the economic upon political life. Marx was essentially a child of the Industrial Revolution and large-scale industry. His fundamental doctrine was created from observation of nascent factory industry and the political system of Prussia. This teaching was different from the classical economists' because Marx was a sociologist. Whereas the classical economists' theory of society was assumed from their own environment, undiscussed, and accepted as unalterable destiny, Marx's was conscious and revolutionary. Through the pages of Adam Smith there still stalks the figure of the farmer, going to and fro in his seasons, sowing in spring-time the seed-capital, with the help of his labourers, tending the soil in summer and living on the surplus of last year's harvest, while in autumn the new harvest is gathered for distribution among seed-capital, rent, and wages-fund. But the pages of Marx and Engels smell of factory-chimney smoke: there is the old regularity, but a *tempo* entirely new: the clatter of artisans' clogs. For machines of steel and iron have taken the earth's place as the medium through which men transform crude energy into the products they most desire.

We do not yet understand the major implications of the transition from the agricultural to the industrial basis of economic life. Only tentatively and piecemeal are they being investigated.<sup>2</sup>

The political scientist may study economic life in two categories: the first, the actual organization and its probable effects upon political life, and, the second, the motives which drive the organization.

### ECONOMIC ORGANIZATION

1. The economic organization of modern societies is based upon Indirect Production. The commodities which men and women regularly make, and the services they perform, are not directly for themselves; but they are at the command of others, at any rate to satisfy the demands made or likely to be made by other people. The time has long passed when the family or even the village or town was

<sup>1</sup> Cf. Pöhlmann, *Geschichte der Sozialen Frage und Sozialismus in derantiken Welt* (3rd Edition), Berlin, 1928, 2 Vols.

<sup>2</sup> The works of Duguit, Oppenheimer, Leroy, Charles Beard, Cole, the Webbs and others are almost entirely occupied with this relationship, and one constitution at least, the German, was deliberately designed to fit the economic organization of to-day.

self-sufficing. Further, besides this indirect production and its natural accessory, *Exchange*, modern production is characterized by Division of Labour, i.e. the producer makes part of an article, and its value is created by its utility as part of a complete consumable commodity. It is clear that if such a state of production is worth anything to human beings it will be conserved in proportion to its worth by institutions especially established to that end. In fact, indirect production and division of labour enormously promote the economy of industries, and without them the total produce would be meagre. Indeed, it is difficult to conceive the use of all the modern mechanical-power apparatus and energy (coal, gas, oil, electricity, etc.) without indirect production and division of labour. In proportion, then, as people value a high standard of living, so are the advantages of this mode of economic organization sought. The strength of the world's desire for the standard is to be learned from the ruthless abolition of handicrafts, guilds, and rules, the migration from country to town, and from one country to another, during the nineteenth century. Was there ever such a busy and disturbed century? To conserve these economic advantages the fundamental need is a condition of harmony and peace, at least within the State's territory, and to-day, far beyond it, in the international sphere. We must be sure that our market will not be missing when the job is done, that when all parts of the commodity are ready no obstacle shall exist to their assembly. A strong claim in the formation of the State, therefore, is the claim for peace and security, and even a tolerance of spiritual differences, as for instance, in religious belief, and that claim is practically always answered.<sup>1</sup> The whole police apparatus ministers to economic welfare: the standards of weights, measures and qualities of goods and services are laid down by the supreme authority and administered directly by it or under its direction,<sup>2</sup> and the political institutions of the State, in theory at least, serve an artisan or a merchant, or a financier, not proportionally to the worth of his religion, the distinction of his native place,<sup>3</sup> or the aesthetic quality of his accent, but almost purely as a unit in the economic organization in which mutual dependence and co-operation bring about the highest economy. Wherever and whenever industry and trade took on the character here assigned to it, the same reaction of political institutions was observable. To-day that interdependence is singularly close; for no other age could boast that its population disposes of so much energy per head. In none, therefore, could a single trader mean so much to the rest, or all of them to one another; their power to

<sup>1</sup> Cf. Weber, *General Economic History*, translated by F. H. Knight, London, 1923.

<sup>2</sup> Cf. Freund, *The Police Power*, Chicago, 1904, paragraphs 65, 273-5.

<sup>3</sup> Foreigners, 'outlanders', still suffer discrimination; their goods are prohibited, or their agencies are excluded, or their products branded.

cripple and to serve has immeasurably increased. This power contributes to the majesty and authority of the State, and supplies it with the power, in great or less measure, to make its authority decisive. For one human motive, with its cluster of psychological and physical urges, can only be held in check by one or several of equal aggregate power.

From the standpoint of the economist, therefore, the State is an economic institution ; from the standpoint of the political scientist economic organization is a factor whose form has a necessary influence upon that of the State. If the economic motive is strong enough the political institution is obliged to respect its processes. That is not deplorable to the patient searcher, though it may be to the political reformer, for as Maeterlinck says : ' There comes, too, a period of life when we have more joy in saying the thing that is true than in saying the thing that merely is wonderful.'

2. Yet modern economic organization is not marked only by the indirectness of production. Of enormous significance is the fact that its methods of production are ' roundabout ', as Böhm-Bawerk says.<sup>1</sup> Commodities and services are not, as a rule, made for hand-to-mouth consumption : the planning of production for the future is necessary in every society, particularly where indirect production is so complexly organized ; its necessity takes on a special urgency when technical methods of production, with expensive and laboriously made machines and organization, are used. This is the particular and amazing difference between the nineteenth century and all others that preceded it. The production of the material welfare consumable on any one day is dependent upon concerted efforts made long before, sometimes years before, through a complicated and expensive organization of machines and men. Without preliminary calculation and organization the goods would not be there : without the anticipated consumer the preliminary calculation and organization would be useless. Anticipation of future wants sets men to work and organize ; they save, hoping for a future gratification greater than their wealth affords at present<sup>2</sup> ; a thousand things are assembled and fashioned ; future tasks are assigned ; labour is engaged, and capital borrowed ; savings are accumulated ; and the relative value of present and future consumption assessed by the millions who decide whether to save or to spend. The better this is done, the cheaper the final product ; and, in proportion as this cheapness is wanted, are roundabout methods of production pursued. Cheapness has tremendous power over men : in both unitary and

<sup>1</sup> E. V. Böhm-Bawerk, *Positive Theorie des Kapitals*, 1888, translated by W. Smart, London, 1891, Book I, Chap. II ; see also Marshall, *Principles of Economics* (8th Edition), London, 1927, p. 583 n.

<sup>2</sup> Irving Fisher, *The Rate of Interest*, 1907.

federal States, for example, it enabled the buying out of the desire for local self-government.

The virtue of this method of production is its punctuality, and its meticulousness : all must proceed as anticipated and arranged. No single item with which it reckons may disappoint on pain of disaster to the general plan. Calculations are made in eighths, thirty-seconds, sixty-fourths, in thousandths. Let us call to mind the phrases of modern scientific management, 'correct timing', and 'the continuous belt'. Picture, then, this condition of economic affairs, which actually pertains in the States we describe (though not equally in all) : the indispensable basis of their high material welfare (not to speak here of those many non-economic aspects of its life which are sustained by economic welfare) is the intricate subdivision of labour among independent, specialized, and wellnigh non-versatile economic groups. These base their activity upon carefully calculated anticipation and probabilities of the demand for and supply of goods and services.

We have reached a stage of economic production in which the range and prediction are not merely concerned with territory, but with distant time. If any one of the multitude of factors in this calculation is changed by an undue interruption of supply, for example, a strike in an industry of importance, grievous harm may be done to the life of many other parts of the community, which, so far from being immediate parties to the dispute, are entirely ignorant of it. The State, if nothing else precedes it in time and efficiency, is required to maintain the continuous fulfilment of social expectations, and, *in proportion* as these are vital to the civilization desired, obedience to the State must be unconditional. In fact, the legislation of the last forty years has been increasingly occupied with the political implications of this method of production. It is to be particularly observed in legislation affecting the position of industrial organizations, like Trade Unions and Employers' Associations, and the right to strike. It culminated in the Emergency Powers Act of 1920,<sup>1</sup>

<sup>1</sup> Emergency Powers Act, 1920, 1 : 'If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency) declare that a state of emergency exists' ; Emergency Regulations, 1926, Regulation 21 : 'If any person attempts or does any act calculated or likely to cause mutiny, sedition or disaffection among any of His Majesty's forces, or among the members of any police force, or any fire brigade, or among the civilian population, or to impede, delay or restrict any measures taken for securing and regulating the supply or distribution of food, water, fuel, light and other necessities, or for maintaining the means of transit or of locomotion, or for any other purposes essential to the public safety or the life of the community, he shall be guilty of an offence against these regulations.'

the Trades Disputes Act of 1926 in England,<sup>1</sup> a large body of interesting judgements in the American Courts on injunctions and statutes to restrain strikes and conspiracies in restraint of trade,<sup>2</sup> in Article 48 of the German Constitution<sup>3</sup> which, word for word of the regulations issued under it, has an effect almost identical with the British Emergency Powers Act, and the stigmatization of the strikes in the Civil Services as 'mutiny' against the State in France, and legislation to the same effect in all countries.<sup>4</sup> In Australia, New Zealand and Italy, it is almost entirely forbidden to strike.<sup>5</sup> There are *libretti* of Wagnerian Opera whose margins contain at the appropriate places an indication of the *leit-motif*. The *leit-motif* which could properly be indicated on the margins of the Parliamentary Debates and on the Acts we have mentioned would be: *the Principle of Continuity*, or 'Thou shalt not stop!' This implies the regular, punctual and continuous fulfilment of economic duties, not merely for your own benefit, or for a specific employer's benefit—the law of contract, and master and servant have supplied rules of that kind for centuries—but for the sake of the standard of living, and through this for the total culture<sup>6</sup> of the nation, or as the phrase goes in troubled times, the 'community'. The commonest symptom of these aspects of our civilization is that every one carries a watch, all have ready access to a calendar, and cheap diaries are sold by the million.

<sup>1</sup> 'We are justified in claiming that this Bill is in fact a Bill to vindicate the authority of the State and protect the liberties of the citizen. It is easy to see that, if even a comparatively small minority were able to capture the machinery of trade unionism and to use it for political purposes, if they were able to bring about a general and concerted stoppage of work, they might well be able, although they were unable to convince their fellow-citizens of the justice of their political theories, yet to compel their acceptance by threats of starvation and of ruin to the community at large, and of destruction to our industry and commerce.'—Sir D. Hogg, 2nd Reading Trades Disputes Bill, Hansard, 1927, Vol. 205, pp. 1306, 1307. Cf. also the argument in the 2nd Reading and the Standing Committee on the abortive Bill of 1931, particularly.

<sup>2</sup> Cf. *Wilson v. New*, 243, U.S. 332, 1917: 'Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed?'; *Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262, U.S. 522.

<sup>3</sup> Cf. Chap. XXVI *infra*.

<sup>4</sup> Cf. Chap. XXXIV *infra*.

<sup>5</sup> Cf. *Fascist Labour Charter*, Paragraphs 5 and 10. (5) The Magistrature of Labour is the organ whereby the State shall intervene to regulate labour controversies, whether with reference to the observance of contracts or other existing regulations, or with reference to the determination of new labour conditions. (10) In labour disputes, judicial action may not be undertaken until the corporative organ has failed to bring about a settlement by conciliatory means; *New Zealand*: Legislation instituting Compulsory Arbitration and a system of penalties, 1894–1925; *Australia*: similar legislation, 1904–21.

<sup>6</sup> *Trade Disputes and Trade Unions Act*, 1927: 'It is hereby declared that any strike is illegal if it is a strike designed or calculated to coerce the Government either directly or by inflicting hardship upon the community.' Cf. also the proceedings in Standing Committee C on the Trade Disputes and Trade Unions (Amendment) Bill, 24 February and 3 March, 1931.



These forces determine, with iron inflexibility, such vital questions as the extent of state activity. Neither economic welfare, nor political liberty, are absolute unchanging quantities; one age prefers more of one than of the other, different countries vary in their respective desires for these respective satisfactions (especially, for example, is a difference between France and the Anglo-Saxon countries noticeable), and among individual men and women very great differences are perceptible.

3. Modern economic organization affects political activity and institutions through the effects of Division of Labour. In order to safeguard and develop their interests in the division of the product of industry, in order also to further their cultural development, men and women, engaged in similar tasks, whether in the same factory or craft or industry, form organizations. The community<sup>1</sup> of industry bids fair to outdo in significance the community of religion or neighbourhood.<sup>2</sup> A special allegiance to the group-organization founded on the special interests it represents and seeks continuously to realize, evolves, and it is difficult, almost impossible, for the individual member of such a group to compare the worth of his loyalty to it with his loyalty to communities, and the great community, the State, outside it, and comparing, to rate its value lower. Such a voluntary acceptance of a secondary status comes sometimes, but not often.<sup>3</sup> The respective values to be compared are so intangible and comprehensive that even a fine philosophic mind measures them with difficulty. The average man tends to modify his special occupational conceit and allegiance only when he is persuaded that the effects are, in the ultimate sum of economic good and evil, good for him, or when, not accepting the argument, he is forced into the behaviour it implies. His group is unmistakably the potential subverter of the State of the day, and that State is, at a certain point, bound to 'push back'. How strong this disruptive sectional quality is, can be seen from the behaviour of Trade Unions towards each other,<sup>4</sup> the natural history of joint strikes,<sup>5</sup> and the competition of trade and industrial associations for representation upon such an institution as the German Economic Council.<sup>6</sup> If we needed history to point

<sup>1</sup> So in the life of Trade Unions, as any observer, actually in politics, may notice.

<sup>2</sup> Its extreme form is the Marxian and Bolshevik doctrine of the international solidarity of the proletariat and the bourgeoisie.

<sup>3</sup> During the British General Strike of 1926, for example, quite a large number of Civil Servants had to choose between their loyalty to the strikers or the Government, for they were asked to volunteer for emergency services. The issue split the ranks of the clerical officers.

<sup>4</sup> Cf. Webb, *The History of Trade Unionism*, London, 1920; Cole, *The World of Labour*, London, 1928, Chaps. III, VI, p. 171 ff.; S. Perlman, *A History of Trade Unionism in the United States*, New York, 1923.

<sup>5</sup> Cole, *Black Friday*, *Labour Magazine*, 1921.

<sup>6</sup> Cf. Finer, *Representative Government and a Parliament of Industry*, Part II, Chap. IV.

a lesson amply taught by contemporary experience, there is the history of the Medieval Gilds, their readiness to burden others with high prices, and to obtain protection of old habits and customs, wages, profits, at the cost of consumers and rival producers. Agriculture battles with industry, 'heavy' and export industries, with the fine industries and domestic production, commerce with manufactures, finances with both, handicrafts with factory industry, co-operatives with private traders—they support different political parties and their money and propaganda finds them a way into Parliament and the executive departments. Yet it cannot be denied that the economic life-blood of the nation actually circulates in these occupations, that men cannot avoid preoccupation therewith, and that in this, as in every loyalty, there are creative possibilities. Political institutions are adapted, more or less cleverly or stupidly, to this situation: disruption is penalized and crushed by law and its forceful agencies, and sectional views are consulted, weighed, and judged, all in the name of the greatest economic welfare of all the contending interests. The method of consultation is described in the chapters on Parties and Parliaments. It is enough at this point to have suggested that economic organization imposes tasks on political institutions, in terms of their activity and their constitution.<sup>1</sup>

4. Now modern industry exhibits not merely a division into separate occupations; but a division between those who actually and legally control the instruments of production—the material equipment, and the organization—and those who are obliged to submit to an occupational discipline which may be imposed not merely by the demands of the consumer for quality, cheapness and regularity of supply; but also by the personal character of the owner of the instruments of production. What are the broad political implications of this feature of industrial organization? Let us first be clear about one thing. Employer and employed are equally servants of all those forces which the economist calls Demand, and for which we may use the concrete term, the Consumer. The employer as well as the employed will receive no income unless the Consumer is satisfied in the long run. Any employer, whatever his nature, kind or cruel, whatever the method of his selection, by birth or property, or elected by the workers, is bound to pass on to all workers the orders implied in the consumer's demand. This fundamental relationship must be respected by all political institutions; should they fail in this, they must find themselves obliged in some way to use persuasion or force to maintain their alternative. On

<sup>1</sup> Other examples are the politics of the regulation of the labour market (see Commons and Andrews, *Principles of Labour Legislation*, 2nd Edition, New York, 1920); and the problem of unemployment and accident insurance: Beveridge, *Insurance for All and Everything and Unemployment*, Edn. 1930.

the whole, political institutions live in accordance with this relationship, though they also include attempts to affect the employer-employed relationship by governing the consumer. Thus, for example, certain commodities may not be manufactured and sold, or industry is not allowed to be carried on unless under certain conditions, as under Trade Board Regulations.

Political tension, however, arises especially in the relationship between employer and employed from the secondary rôle of the employer—as the legal controller of the equipment, and, therefore, as supreme manager of the methods, processes, and conditions of work. Workers in every occupation dispute the employer's control; the workers of all occupations dispute the position of all employers, and class stands against class. What is the substance of this opposition? The political scientist must be aware of the chief momenta in the antagonism, for as they affect the State so they explain it. Most workers do not understand the employer's position as the servant of the consumer, as an intermediary between demand and supply. This is a mistake easily made even by impartial students, and it is not surprising that the workers, placed as they are, and with a meagre education, should not understand this. But any State would be bound to teach, and where necessary to enforce, this doctrine; for it is true, whether industrial control were by the Capitalist, or a representative council of workers' syndicates, or in State enterprise, as in all modern postal services. Secondly, many workers are jealous of the employer's wealth, the profits he draws from the enterprise, and his general freedom from regular hours and control. This jealousy is mitigated, if not entirely abolished, where the employer's affluence is clearly the direct result of his ability. But the jealousy cannot but exist, and tension be serious, where that affluence is not grounded upon service, where it is the result of a monopolistic control or privilege brought into existence by private friendship or blood-relationship and supported by the law of property.<sup>1</sup>

The clever, ambitious, sensitive worker cannot but harbour a sense of injustice, and we must expect to see his endeavour to remove its causes. To see this world daily slipping by and his talents unrewarded, to realize, too, that his children must possess extraordinary ability and grit to climb to the rungs whence the hereditary mediocre effortlessly start, must be for him a revolutionary incentive.<sup>2</sup> Even if other impulses did not independently engender in him those ideals which have most richly contributed to the commonplaces of socialistic thought, such an incentive would compel him to contrive an exit,

<sup>1</sup> Oppenheimer, op. cit., Jena, 1926, Vol. II, *Der Staat*, p. 685 ff.

<sup>2</sup> Hodgskin, *Labour Defended against the Claims of Capital*, 1825, reprinted London, 1922; F. Mehring, *Geschichte der Deutschen Sozialdemokratie*; cf. also *Memoirs of Phillip Scheidemann*, *Memoirs of Tom Mann*; Robert Smillie, *My Life for Labour*.

and certainly make him into a follower of those who offer happier prospects. The worker, further, contrasts his own daily powerlessness with the power of the employer, and questions the method of his selection and the sanctions of his power. These are based upon private property, 'the right to do what he likes with his own', and he feels (and whether he has scientific reason on his side or no is another matter), that the 'right to do what he likes with his own' is, in fact, under modern industrial conditions, pushed too far for the ordinary worker's well-being; that alternative methods of selection would at once render him more at ease spiritually, in the factory or on the land, and, further, would bring about an increase in the total product of industry.

Around these feelings and reasoning are woven then the history, true and mythical, of class struggles; and economic arrangements have their inevitable repercussion on education and culture. The leisure of the classes is differently spent, their manners of speech and deportment diverge by reason of their different economic, social and educational destinies. Those from whom as a class the workers differ are typified in images and names charged with hostility—the Employer, the Leisured Class, the Bourgeois, the Upper Class, the Renter, the Capitalist—and these, again, retaliate in kind. The images, again, with their exaggerated features, deepen the normal hostility.

There is, owing to the operation and organization of the modern economic system supported by the law at present, a social dissensus or cleavage which causes permanent dissatisfaction and skirmishing<sup>1</sup> on the part of the mass of occupied people, followed from time to time by open violence and stoppages of production. Political institutions arise to express or overcome the dissensus. The dissensus is different in different countries, and the methods adopted by governments vary very much, as we show in later chapters. We may notice here, however, that this social dissensus goes back ultimately to the law relating to property and inheritance, to be discussed later in this chapter.

5. The Division of Labour, and the formation of well-organized groups, and 'classes', are in modern States closely relevant to the theories of political parties. This relevance is described in some detail in the chapters on Parties. Such interests and parties are not the result of personal vagaries and theoretical perversity, not of an anti-patriotic, anti-national plan, freely preconceived and pursued out of sheer enthusiasm for doctrine, but of plainly perceptible causes, material and spiritual, directly and inseparably bound up with our present mode of economic life.

6. Among the factors not yet taken into account is the actual daily management of economic resources, material and human.

<sup>1</sup> Pouget, *Le Sabotage*, Paris.

Modern economic organization is peculiarly marked by its extreme, often surprising, degree of *decentralization*. That is, the economic process is not regulated from one centre, or even from a few great centres, but almost every individual human being is an independent centre of decision, energy and responsibility. I exaggerate; but it is only to convey the substantial effect of the complex facts of the world industry. Broadly, the area of economic freedom of choice is enormously wide, that of socially planned and enforced behaviour very small.

The development which has, in our own day, led to this situation is traceable to two broad classes of causes: men's theories and passions concerning their worldly existence, rewards and punishments; and secondly, the theories arising from the actual experience and past failure of gild, municipal and State control. In the first broad class of causes will be found dominant the spiritual changes which were at once the causes and effects of religious Protestantism, their victorious course beginning in the fifteenth century, their essence, being summed up in Strafford's description of the Puritans, 'The very genius of that nation of people leads them always to oppose, as well civilly as ecclesiastically all that ever authority ordains for them.'<sup>1</sup> In the second, the grand factor is the influence of the Physiocrats,<sup>2</sup> Adam Smith, and the older economists, who expounded the lessons taught by the failure of one and a half centuries of Mercantilism and its Continental types, Colbertism and Cameralism. Of this creed the essence may be quoted:

'He (the individual),' says Adam Smith, 'generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security, and by directing that industry in such a manner as its produce may be of greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an *invisible hand* to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good.'<sup>3</sup>

Thus spiritual development and economic experience together resulted in that extreme decentralization which so marks the economic organization of our own day. Individual men and women

<sup>1</sup> Tawney, *Religion and the Rise of Capitalism*, London, 1926, p. 237; cf. Weber *Protestantische Ethik*, Tübingen, 1920-2.

<sup>2</sup> Cf. Chap. III.

<sup>3</sup> Adam Smith, *Wealth of Nations* (Cannan's Edition), I, 421; cf. also an earlier statement of this in an apologia for enclosures. Joseph Lee, *A Vindication of a Regulated Enclosure*, 1656 (quoted Tawney, op. cit., p. 259): 'It is an undeniable maxime that every one by the light of nature and reason will do that which makes for his greatest advantage. . . . The advancement of private persons will be the advantage of the public.'

and, till late in the nineteenth century, children, were neither regulated nor hindered by government in their calculation of what and how much of economic goods or services should be produced or consumed ; the individual alone was responsible, and he received the reward and suffered the damage. The valuation of services and goods was not undertaken by government from a wide, national point of view, but by the unsystematized process of price-fixing by millions of otherwise unrelated individuals. This system of production and distribution of wealth is popularly called 'capitalism', and the term is redolent of moral blame or praise according as the user is an opponent or supporter, not merely of this particular organization of industry, but of many other social conditions more or less bound up with it. For us, in this present analysis, 'capitalism' is no more than extreme economic decentralization, and the 'capitalist' merely an administrator free of governmental control.

There is no doubt that this system, operating for over a century, has caused an immense increase in the aggregate wealth of these countries, and that, for greatly increased populations, a greatly increased standard of living is possible. However, a large proportion of the population in every generation since, say 1800, has been so badly fed, housed, clothed, educated, and sick, that its condition has been one of permanent misery. The economic system has not prevented dark blots from staining civilization, nor has economic well-being gone with any regularity and certainty to those whose merits in social life were splendid but not economic. No government in any country since the Reformation seems fully to have realized what might happen to social life where men are left to find both wealth and religion at their own free will.<sup>1</sup>

Further, as the capitalist system developed it was seen that its efficiency was dependent more upon large-scale regulation, that is upon the combination of small units, than upon its old doctrine of decentralization and free competitive enterprise. By about 1845 *laissez-faire* and its attendant social doctrines were played out ; from 1880 government has with ever-accelerated speed entered as supreme regulator of the economic process, and to-day we are in the middle of the social battle around the control of industry. This centralizing and regulating movement was noticed before 1845 by De Tocqueville<sup>2</sup> ; and since the decisive turning-point of 1880, the conceptions of personal liberty and social duty have been revolutionized. The day of Samuel Smiles and John Stuart Mill's 'Liberty' have gone, so far as we can now see, never to return.

The trend is all against the 'competition' of individuals and

<sup>1</sup> Cf. Newman, *Apologia pro vita sua* : 'The Reformation set in motion that process of which the issue is still in the future.'

<sup>2</sup> *Democracy in America*, Vol. II, Book IV, Chap. V.

small firms, and all towards the creation of great Trusts and Combines, ordering and monopolizing the production and sale of commodities.<sup>1</sup> They are economical, for the fullest advantages of the technique of production in such commodities as electricity, gas, water-power, coal, and potash, and in transport services, are obtainable only when a *single* management determines the amount and kind of capital and labour strictly necessary to produce the quantities and qualities required. *They may become tyrannical*, for they exclude by law or in fact alternative supplies. When they are economical, political power is used to help their birth, overcome wasteful decentralization and competition, and regulate their rights and obligations; when they are tyrannical, government is called upon to offer the consumer and small producers its protection.

Political institutions have already proceeded far in their control of industry and economic distribution in all the countries we are discussing.<sup>2</sup> There are variations of extent in each of them, but it is perfectly clear that the extent and forms of such control now constitute the most passionately contested question in political life. *Étatisme* and syndicalism, Socialism and Guild Socialism,<sup>3</sup> *Planwirtschaft* and *Gemeinwirtschaft*,<sup>4</sup> Rationalization and Amalgamation,<sup>5</sup> and Communism—all in their native countries and outside them—are the solutions which men, organized politically, are demanding or refusing.

A special aspect of this is the relationship between finance and industry. The banking system is the intermediary between savers and users of capital. The banks are convenient deposit institutions and accumulate savings, and then, upon this basis, make loans for investment and business enterprise. The extent to which they risk their depositors' money has for generations been regulated by the State since the ordinary safeguard of the withdrawal of deposits is usually ineffective once a failure has occurred. Government thus acts preventatively as a support to credit, especially where investments are made abroad, and alien notions of government and financial honour prevail; and this, again, is an encouragement to saving. The supply

<sup>1</sup> Cf. *Report of the Committee of the Ministry of Reconstruction on Trusts*, 1918, Ed. 9236; Levy, *Monopolies, Cartels and Trusts in British Industry* (translation of 2nd German Edition), London, 1927; Michels, *Cartels, Combines and Trusts in Post-War Germany*, New York, 1928; E. Payen, *Les Monopoles*, Paris, 1920.

<sup>2</sup> Cf. Freund, *Standards of American Legislation*, Chicago, 1926; and by the same author, *The Police Power*, Chicago, 1904.

<sup>3</sup> Cf. Cole, *Guild Socialism Restated*, London, 1920, but see also the same author's, *The Next Ten Years in British Social and Economic Policy*, London, 1929.

<sup>4</sup> Rudolf Wissell, *Praktische Wirtschaftspolitik*, Berlin, 1916; W. V. Möllendorff, *Deutsche Gemeinwirtschaft*, Berlin, 1916.

<sup>5</sup> German Potash Industry: Laws of 1919: Creation of the *Kali-syndikat* and the *Reichskalirat* (see Michels, op. cit.); Report of the Coal Industry Commission, 1919, Cmd. 359, 360; Report of the Royal Commission on the Coal Industry (1925), 1926, cmd. 2600.

of credit for industry and commerce has become vital to the round-about method of production, and agriculture and industries can be helped or ruined by the policy pursued by the banks. Hence the matter has become one of *public* economy, to be regulated according to rules looking to the welfare of the whole body of citizens, not to any particular bank or firm of stock-brokers or manufacturer or merchant, with an eye also to foreign conditions and world-prices, by institutions with more authority to enforce such a policy than the private-profit relationship normally provides.<sup>1</sup>

#### ACQUISITIVENESS

7. Now in all that we have so far said there is latent the likelihood and fear of social strife and misery. Why? It is because the product of industry and agriculture is in men's estimation so scarce that they strain and leap to dispute each parcel of it. Men are to-day ruled by the ideal of the High Standard of Living, and perturbed by the knowledge that even with about eight hours' steady work for five-and-a-half days per week, under conditions of severe industrial discipline unknown to their ancestors, the standard is difficult to attain. They are enormously greedy; they are unconscious of it; and when they meditate upon the depths of their greed they dignify it by the name of an impersonal title like the 'High Standard of Living'. This greed is at the root of most of the major political problems, domestic and international, of the present day. The notion is current that, above all things, the acquisition and consumption of a great amount of material wealth is man's most proper good. This ideal is not the sudden creation of any particular year or set of men, though the phrase has a history perhaps no older than a century. No deliberate weighing up of spiritual and material values caused its establishment. In the last century-and-a-half, Western Europeans and Americans found themselves suddenly in possession of the steam-capacity to acquire immense riches, to increase and multiply. They tasted of the fruit of the machine and found it good. And God came to be spelt Get.

Each generation produced its wonders, its triumphs over the earth, the seas and the heavens, and found itself ever freer of the limitations of time and space; and the Standard of Living became so absorbing a religion to men, even now untouched by criticism, that those who dare to assert another standard, or come from countries where the standard of living is lower, or live and work where it is lower, are treated as damnable heretics!<sup>2</sup> Protective duties are set up against countries with a lower standard.

<sup>1</sup> Cf. Livingston, *The Capital Market; Report on Finance and Industry*, Cmd. 3897, 1931.

<sup>2</sup> 'The introduction of coloured labour would lower and ultimately destroy the standard of living which is being slowly built up in Australia.' . . . —*Report of World Migration Congress, 1928*, p. 362 (Dr. H. V. Evatt, Australia). 'The American people should not sacrifice the future of the working classes in order to improve the con-



The political difficulty is that this greed is for satisfactions which the common opinion of mankind calls noble, and this produces a scramble in which all parties are right. It is true that the mere possession of riches does not necessarily result in its immoral consumption. It is even true that the more riches we have the more may we be able to turn our attention to the pursuit of spiritual beauty and supremely virtuous activity. Yet it comes about that we can reverse Mandeville's<sup>1</sup> famous saying, 'Private vice; public good', and say instead, 'Private good, public vice,' for our very virtues are apt to embroil us in civil commotion and international war. The mother wishes to see her son do well at school and obtain a situation which shall be 'nice', respectable, well-paid, and not too laborious. The father provides the necessary means to achieve such a pleasant destiny. If, however, all mothers and fathers act similarly, and if their sense of what is 'respectable, well-paid, and not too much work', is of a similar quality, the result may be, indeed we have seen it to be, what all parents unite to say they condemn: War at home and abroad. Those economic and social qualities which now pass for family and national virtues inevitably affect industrial relations, and political institutions are unavoidably embroiled in them, since the supreme authority lies with them. Forsythe drives the English State, Buddenbrooks the German, Babbitt and Collingwood the American State, and Belphegor the French. Our preference to wash with soap made of vegetable rather than of animal fats leaves us blind to the exploitation of backward races who are employed to produce the new ingredients. Labour is sweated so that the consumer may be attracted by the cry of cheap! For the rubber supply upon which modern transport so largely depends the cruellest atrocities were committed in Africa.<sup>2</sup> For the oil which drives machinery a daily war is waged between companies and nations,<sup>3</sup> in which hideous strokes of force or guile determine the comparative standard of living of modern nations. We

ditions of the inhabitants of Europe, and it is even questionable whether an unregulated immigration would improve the conditions of Europe and Asia, although it is certain that it would degrade and injure the conditions of labour in this country' (J. Mitchell speaking for organized labour. Quoted from F. T. Carlton, *The History and Problems of Organized Labour*, New York, 1911, p. 341). 'The most important plank in Labour Migration Policy . . . is almost universally recognized to be the maintenance of Labour standards of living: and the best way of securing this is almost as widely recognized to be the adequate trade union control of immigration' (J. W. Brown, *World Migration and Labour*), Amsterdam, 1926, p. 297).

<sup>1</sup> Cf. *Fable of the Bees* (5th Edition, London, 1723).

<sup>2</sup> Woolf, *Empire and Commerce in Africa* (1919); Woolf, *Imperialism and Civilization* (1928); Morel, *Red Rubber* (1906); Report by the Hon. W. G. A. Ormsby-Gore, M.P., on his visit to West Africa during the year 1926, Cmd. 2744; Norman Leys, *Kenya*, 1924.

<sup>3</sup> Delaisi, *Oil: Its Influence on Politics*, translated from the French by C. L. Leese, London, 1922; Hoffman, *Oelpolitik und angelsächsischer Imperialismus*, Berlin, 1927; Moon, *Imperialism and World Politics*, New York, 1927; S. Nearing and J. Freeman, *Dollar Diplomacy*, London, 1928.

are not content with chocolate, we demand it in forms attractive to the palate and the eye. The very seasons are controlled and Nature's order reversed : for we are not content to wait until our own Spring brings us young vegetables, they are ravished from sunnier climates, and even the bees are made to give up their honey by the artificial fabrication of the light and heat of Summer. Every ingenuity is practised to tear from man and nature the utmost they can give to satisfy the appetites. But Englishmen cannot ask for high dividends without brow-beating Mexicans and Egyptians, or fighting in China ; the Frenchmen cry out for the *mise en valeur* of their colonies ; the Germans turn towards Russia as a field of exploitation since opportunities have been denied them elsewhere ; and the Americans fearfully hold their hand over their pile of dollars lest too many immigrants should knock off a few and reduce its height.<sup>1</sup>

**The State and Population.** Now individuals, families, industries, and nations, might be as acquisitive as it is in them to be were there enough material welfare to satisfy all. For what we call excess is measured by the ratio between how much is demanded, the number of the applicants, and the amount available for distribution. Here's the rub. For the full strength of human passions is obliged, as the world is constituted at present, to operate through exhaustible material resources, and therefore to rage against the unyielding confines.

The amount is limited by the condition and quality of economic organization, by industrial and agricultural technique : and then the amount per head is the aggregate producible quantity divided by the number of the population. At any one moment man's ability to exploit natural resources and control the number of his kind fixes the amount of material welfare available for the satisfaction of his appetites. Man's knowledge and power over nature increase, and, therefore, the number who can live and develop their personalities as they will, may increase. But the political scientist, especially when he is expected to consider the larger schemes of social amelioration, may as well abdicate at once, unless he recognizes that his answer is governed by two conditions : (1) the uncertain prospect of invention, which may come slowly or rapidly, but which is hardly at all amenable to direction and control ; (2) that increases or decreases in birth-rate over a short period are not within political power to alter, and that it is very problematical whether reproduction even over a long period can be influenced by governmental plans : the inspectorate, for example, would be an insuperable difficulty ! It then follows that men's desires, satisfiable

<sup>1</sup> It might also be pointed out that the white population of America benefits greatly from the social and sometimes physical repression of the millions of negroes in the South. The forcing of the negroes to the performance of menial tasks, and the consequent creation of a large labour supply, decreases the price of the commodities (or services) thus produced. This exploitation is partly implemented by the legal and actual refusal of the franchise to the negro.

by economic means, may be variable within the limits set by (1) and (2), but a limit nevertheless exists to the total amount of material welfare at any time available to realize human aspirations. This may be considered unfortunate ; but it is dreadfully true.

Since, then, the quantity is only slowly and uncertainly elastic, while the aspirations of men are limitless and evolve rapidly ; and since, in our own day, civilization consists so largely of those aspirations which can be satisfied only by economic means, the struggle for those means is bitter and is bound to be protracted. The struggle is organized not in industry alone, not merely in the workshops, the banks, and in the fields, but in the educational system, the Churches, the Civil Service, the municipalities and the parliamentary constituencies. An immensely difficult task is thrown upon political institutions, for besides their early duty of maintaining order, administering justice and defending the nation against external forces, tasks of great difficulty, the State has come directly to include and control the economic institutions in which the struggle rages : and the body which the creditors seek to divide among them is no longer something outside and only remotely related to the State : it more and more becomes identical with the State. In many aspects, indeed, political and economic institutions cannot be superficially distinguished from one another, and the State becomes a railway company, or a telephone concern, or a firm of ship builders, or an industrial research association, a vast nation-wide hospital, and even a universal scavenger. The implications of this development are of the profoundest importance to the political scientist, and he must watch for their manifestation with the utmost care. Meanwhile he must remember that the power of the land to sustain a population establishes an ultimate though a variable margin to the power of political institutions : it is perhaps the most powerful of the elements which govern the extent to which the ideally good is realizable. Hence in England a public battle over the right to instruct in methods of contraception. In France, other motives impel to the increase of population : the desire for a large army.

8. 'Property', said Harrington, 'produces Empire'; and fundamental in any economic and therefore political organization is the problem of private property. Private means exclusive ; and it is clear that the power of the great association called the State must vary with the extent to which the exclusiveness of possessions is accorded by morals and law to individuals and lesser groups. Whether possessions are held to be lent for a time, or for a lifetime, or whether the power of unregulated disposition goes further, beyond the owner's lifetime, and whether the general mind of the time does or does not attach the idea of social obligation to that of property—all these things manifestly affect the nature of political institutions and the nature of the State.

For one thing, in proportion as the notion of exclusiveness prevails, political institutions find difficulties in obtaining means. Many a brilliant scheme of social reform has been shattered by the fierce obduracy of those who wish to have and hold their exclusive share. The peasantry especially show this trait, and in fact must be reckoned with in countries with a large agricultural population like Germany, France and the U.S.A.

Now, broadly speaking, the modern State began with the theory and the practice of the social regulation of property. According to the Church, which preceded the State as the supreme community, and according to the State which was at the outset ruled by religious traditions and even by religious ministers, a man could not do as he liked with his own.<sup>1</sup> But by the middle of the eighteenth century men had escaped from the traditional morality and therefore from the State which had sought to be its vehicle. John Locke, already in 1689, had claimed the immunity of property from arbitrary seizure by the State, that is, that property should be excluded from the sphere of the acknowledged supremacy of the State<sup>2</sup>; and, before him, the Parliamentary champions against the Crown became warriors partly to safeguard their property from irregular levies by the State. Blackstone makes a profound obeisance to the English principle: 'so great is the regard of the law for private property that it will not authorize the least violation of it; not even for the general good of the whole community'.<sup>3</sup> The Continent was slower to extricate itself from the toils of the benevolent despots and their economists and public administrators, but when it did, in France particularly, it was with a rebellious cry, the clash of victorious arms, and a philosophy sprung from the head of the *Économistes*. The Physiocrats founded their philosophy of the State upon the axiom that the absolute exclusiveness of property was the only condition of the greatest material welfare, and that this again resulted in the highest moral good. All the Declarations of Rights on the Continent and the U.S.A. included the right to private property, and even in the German Constitution of 1848 it holds a proud place. The essence of the philosophy which supported these clauses was plain: (1) it is good that much wealth should be created; (2) the greatest amount will be created if men are certain that the reward for which they work will be exclusively theirs. We shall never be able to give a certain answer to the question: If the world between 1750 and 1850 had admitted the right of the State to regulate individual activities and the disposition of property, would there have been as much riches created with less attendant social misery? For we have no means of even guessing who

<sup>1</sup> Cf. Tawney, *Religion and the Rise of Capitalism*; *The Acquisitive Society*.

<sup>2</sup> Locke, *Civil Government*.

<sup>3</sup> Blackstone's *Commentaries*, Book I, p. 139.

would have governed, and with what competence, in the name of the State, and that is decisive of the question. We know only that critics arose to proclaim the misery of the masses, to call attention to the advent of new industrial relations and institutions which needed social control, and that governments began, upon various principles, and under various names, to deny the exclusiveness of property, and to take away from its privateness.

The controversies of our own day are embittered as they circle around the problem how far this tendency shall go. It takes three main lines : property is encroached upon (1) by the right of eminent domain ; (2) by the police power ; and (3) by taxation.

Eminent domain is an American term : but other countries possess its equivalent.<sup>1</sup> It is the recognition that private property may be taken by the State for public purposes, with due compensation to the proprietor, and the most striking example of its necessity is the consequences which would follow where a community needed a railway, yet where private property was absolute, so that it could not be made without the consent of every owner on the projected line. The property to which this most usually applies is land, but it has come to include franchises and contracts. Early in the century this encroachment upon the exclusiveness of property raised few controversies because it took place only for public works, that is, when direct use by the public authority, central or local, was to be made of the property. But the congregation of people in small areas, and the necessities created by such inventions as the railways and other means of transport and communication, have resulted in extensions of the right which could only be avoided at the cost of immense public inconvenience : for example, roads (an ancient example), trams, light railways, telegraph, telephone, and electricity lines, drains, irrigation, canals, parks, and baths.<sup>2</sup>

Thus public 'use' begins to be replaced by public 'benefit' (a wider term), especially since the rise, in recent generations, of the social expectancy that government ought positively to promote the public welfare. One motive struggles with another : there is everywhere an increasing note of anxiety at the extension of public demands upon private property, as well as a recognition of the impossibility of ignoring the social interest. Rules have been elaborated, and are applied, to secure that, on the one hand, the public (which may mean a small number of people) shall not have excessive difficulty in obtaining the

<sup>1</sup> Cf. Lewis, *Eminent Domain* ; Aucoc, *Conferences sur le droit administratif*, Vol. II ; Dellalén et al., *De l'expropriation pour cause d'utilité public* ; Hauriou, *Précis de droit administratif*, p. 693 ff. ; E. Carpentier, *L'expropriation pour cause d'utilité public*, Paris, 1919. Germany : *Enteignung* (expropriation), see Otto Mayer, *Verwaltungsrecht*, Vol. II (3rd Edition) Section 3. The author calls it 'the strongest encroachment on the property of the subject'.

<sup>2</sup> Cf. Marizis et Cot, *Manuel des Travaux Publics*, Paris, 1930.

land it needs, and, on the other hand, that the proprietors shall receive proper notice of and compensation for expropriation or damage. Yet, as regards the individual, sentiment and the trouble of readaptation, are not compensated. In addition to the direct exercise of eminent domain, the State gives the right to encroach upon private property by special legislative process (private bills) to individuals and corporations who serve an interest of public benefit with small attendant private injury.

The field of eminent domain is wide and is getting wider, but it cannot be compared in importance with the power over property exercised under the Police Power and Public Policy. Briefly those phrases embody the principle that the State has 'the power of promoting the public welfare by restraining and regulating the use of liberty and property'.<sup>1</sup> The principle is used by Legislatures to pass laws for the public good, and though they may abolish property rights and expectations, abolish whole branches of industry, they bring with them no compensation to those who are immediately injured. For example, the vast industry of alcoholic liquors was abolished almost at a stroke in the U.S.A.; no one received compensation. Where a statute is not explicit enough to deny the Courts of Justice the power of interpretation they also weigh individual or local engagements, bonds and trusts against the public good. In England the common law principle of Public Policy,<sup>2</sup> in the U.S.A. the doctrines of 'reasonableness' and 'due process of law' are constantly applied to hold the balance between public and individual, while in France and Germany the courts are not as limited by the great codes of law as might be supposed, and the whole teaching of jurisprudence has in the last two generations been moulded by and moulded for the new conceptions of social regulation.<sup>3</sup> It is enough here merely to have indicated this encroachment by the State upon individual control of property. Its nature is obvious: property may be used only upon conditions; it is no longer unconditional control; and the number and magnitude of the restrictions are already very large and are daily becoming larger.<sup>4</sup>

The third means of encroachment upon private property is Taxation, an ancient institution, but nowadays grown vast, and, more

<sup>1</sup> Freund, *The Police Power*, Preface.

<sup>2</sup> Winfield, *Public Policy in the English Common Law*, *Harvard Law Review*, Vol. XLII, No. 1; Knight, *Public Policy in English Law*, *Law Quarterly Review*, Vol. 38, pp. 207-19; *Egerton v. Brownlow*, 4 H.L. Cas. 1, 140 (1853).

<sup>3</sup> Ehrlich, *Die juristische Logik und Grundlegung der Soziologie des Rechts*; Stammler, *Die Lehre von dem richtigen Rechte*, new Edition, Halle, 1926; Duguit, *Les Transformations générales du droit privé depuis le Code Napoléon* (*Continental Legal Hist. Series*, Vol. XI); Génys, *Méthode d'Interprétation et Sources en droit privé positif*; Charmont, *La Renaissance du droit naturel*; see also Allen, *Law in the Making*, for a very able discussion of the subject.

<sup>4</sup> Cf. *Chap. VII on Constitutions*. Eighteenth and nineteenth century Constitutions begin with the axiom of private property, the twentieth century German Constitution puts it in the framework of the common benefit.

important, based upon a public conviction of the amplitude of the State's right to tax, which would amaze the observer, did he not know the passion of the poor for equality, and that authority now resides in the largest number, that is, in the relatively poor. Two developments have led to the tremendous claim of the State upon the income of the individual: the growth of the idea of a National Minimum of Services to be provided to all who need them, and the progress of economic theory with special reference to the Theory of Value. The first is treated elsewhere in this book. A few words about the second are important here. In the seventies of last century Jevons<sup>1</sup> and Menger<sup>2</sup> made important discoveries regarding the basis of economic value: the Theory of Final or Marginal Utility, which, put briefly, and in the form specially relevant to our discussion, runs thus, that every additional portion of income satisfies a need lesser in intensity and urgency than the needs already satisfied. Or, to use a parable invented by Cannan,<sup>3</sup> if there were two men equally starving, and but one loaf of bread to divide between them, the maximum satisfaction is obtainable if each receives one-half the loaf and neither more nor less; for were one to obtain one quarter, and the other three-quarters, then the latter would, after consuming his first quarter, be satisfying needs less and less urgent, until, arrived at the last quarter, the satisfaction obtainable from it would be much less than that obtainable by the first man who had not yet satisfied his more urgent needs. Apply this theory and the parable, as they have been applied, to the distribution of income in a community however large, and there flow from it, from the economic standpoint, two conclusions: the first, that the greatest economic welfare in a community will be obtained only from equality of income<sup>4</sup>; and, secondly, that taxation will only be just if it is *progressive*, not merely proportionate, to income; for to the rich man the value of additional money decreases very rapidly, progressively, that is more than proportionally to its increase in amount, while to the poor decreases of money cause dissatisfaction more than proportionately to its loss.<sup>5</sup> Thus a theoretic basis, rooted in sound psychology, was found for equality and for progressive taxation, most conveniently applicable in Direct Taxation, upon Incomes and Inheritances.<sup>6</sup> The engine of taxation has been fed with a new and wonderful fuel, potent because

<sup>1</sup> Jevons, *Theory of Political Economy*, 1871.

<sup>2</sup> Menger, *Grundsätze der Volkswirtschaftslehre*, Vienna, 1871, and cf. W. Smart, *An Introduction to the Theory of Value on the lines of Menger, Wieser and Böhm-Bawerk*, 1914.

<sup>3</sup> I believe I remember this from one of Cannan's lectures when I was working under him as an undergraduate.

<sup>4</sup> Allowing for difference of need, and remembering the effect equality may have upon productive energies.

<sup>5</sup> Cf. Seligman, *Progressive Taxation*, 1894; Edgworth, *Economic Journal*, VII, 1897; *Pure Theory of Taxation*; Pierson, *Political Economy*; cf. also Dalton, *Public Finance*, 1923.

<sup>6</sup> Cf. Dalton, *The Inequality of Incomes*, 2nd imp., London, 1925.

those who deny the right to its use can be met at once with the rejoinder that to save themselves a *little* harm in taxation they will condemn the poorer to a more than proportionately cruel fate. More. The argument is sound. It meets opposition, however, in the recognition that saving, that is, the accumulation of capital, is easiest from large incomes, and realization of the vital importance of capital to modern productive processes.

Here is the storm-centre of the modern State. Whatever it does must inevitably be paid for. Most must be paid for in terms of taxation since personal services have been discarded as uneconomical. Every tax is a subtraction from private property; it may not be directly taken from capital, but it certainly converts the income to public use. Indeed, taxation has been called confiscation; and it is. When men fight political battles on the field of taxation they not only seek to divert public expenditure from one purpose to a more desirable one: but some attempt to secure that as much money as possible shall be kept in private pockets and freely disposed of by the owner, while others endeavour to draw upon private purses for public expenditure. The modern cry for Economy, for example, derives its volume and stridency, perhaps, more from the impulse 'to do what one likes with one's own' than from the desire to see money well spent by the public authorities.

Thus the State can only accomplish its purposes in proportion to its command of material resources, and since the public domain is nowadays so small in proportion to expenditure, these must come from private property. How passionate is the general adherence to private property may be seen from the strong movements against social legislation, and the evasion of taxes, matters to be noticed presently.

\* \* \* \* \*

For the time being we have said enough to indicate how and in what ways, the Great Society, the State, is concerned in economic institutions and motives. Engraved upon the heart of modern society, to a depth reaching to its inmost core, is the motto of a Birmingham bank: 'He who has, is!' written in the vernacular and not in Latin; and those who would understand the character and functions of modern government must understand the spirit and institutions of which it is a symbol. For though it is not everything to modern man, it is much.<sup>1</sup> 'He who has, is!' That is not all. He who has, governs! To what extent this spirit pervades and shapes political institutions, and to what extent the rest of man's nature holds it in check and contributes other impulses will be seen in the succeeding chapters, especially in that which immediately follows, on the Conditions of State Activity.

<sup>1</sup> The general spirit of modern economic institutions is discussed at length and with considerable learning by Sombart in his work, *Der Moderne Kapitalismus*, I. Especially interesting are the Chapters dealing with the growth of luxury and the development of acquisitiveness.





## PART II

### THE CONDITIONS OF STATE ACTIVITY

#### CHAPTER III. STATE ACTIVITY: HISTORICAL DEVELOPMENT

#### CHAPTER IV. STATE ACTIVITY: ANALYTICAL

‘Will men ever approach the state where they will all have the necessary knowledge for conducting themselves according to their own reason in the common affairs of life, and maintain it exempt from prejudice, so as to know their rights well, and make use of them according to their own opinion and conscience ; where all will be able to obtain, through the development of their faculties, assured means of providing for their needs ; and, lastly, where stupidity and misery will be no more than accidents, and no longer the habitual state of a considerable portion of society ? ’—CONDORCET.



## CHAPTER III

### STATE ACTIVITY: HISTORICAL DEVELOPMENT

#### PRELIMINARY

WE have examined the nature of the State in a general fashion, and the relationship between political and economic institutions. But body and precision can only be obtained from the study of concrete institutions, men, and activities. In the following chapters we analyse actual political behaviour and its propelling forces. These are important in themselves as the things by which we immediately experience the State: for we live with institutions and other people, and not with remote essences and humours like Sovereignty and Authority. But analysis reveals also the *general nature* of political institutions. The quality and extent of 'Stateness', if we may employ such a phrase, is immanent in each particular Department, Parliament, Official, Function, and Local Authority, and each governmental institution, however apparently trifling and insignificant, discovers the inner being of States.

Among the manifestations of the State, its functions hold a cardinal position, and an examination of the conditions of State Activity is elemental to the comprehension of the seemingly inextricable confusion of parts which constitute the State.

There are conditions, under which all government, be it local or central, unitary or Federal, executive, legislative or judicial, democratic or autocratic, labours, and they determine the form and purpose of each particular piece of mechanism. It is to those conditions we must attend. What are the conditions which compel the State to undertake certain activities, and enable it successfully to perform them, and the conditions which place a limit to its successful activity? An exact answer minutely fitting the facts is impossible; the work of a decade upon this alone could not include all the facts. But it is possible to establish, from a number of critical examples, a few generalizations of which the political scientist should be aware. The very broad conclusion which emerges from a study of this kind may be at once stated, though its full meaning is to be found only in the more detailed set of considerations. *Nature is no kinder to the State than it is to men otherwise organized: nor is it more severe.*

Let us first clear the ground of some common fallacies. We use the term State activity, as the most neutral discoverable, to avoid the insinuation of a sense of praise or blame into the discussion. More usual than State 'activity' is State 'interference', or its equivalents, in German, *Einmischung*, and in French, *Ingérence*. These three words are dyslogistic: they are used, in common parlance, as weapons in political conflict: they may be used in a praiseworthy sense when it is desired that political institutions should be employed to stamp out what is conceived to be unjust, ugly, or without utility, they are used when the activity of the State is represented as having a sinister effect upon the otherwise good, beautiful, and useful spontaneous activity of men and women. Both senses have their justification at different times and places, for no State has ever perfectly satisfied all men, nor has any completely dissatisfied everybody, but as scientific tools the words are to be used only with circumspection, and better not at all.

Further, great care must be exercised in the use of the terms 'aims' and 'purpose' of the State. These open the way usually for doctrinaire pronouncements upon what the State 'ought' to do, or false histories, that at a point of time in the past, the State was created with such and such a list of activities to perform. It is enough to say here that a *parti pris* must be avoided, and attention concentrated upon what actually imposes activity upon the State and the conditions of its success or failure.

Before we analyse a number of actual examples of State activity in different countries we may learn a good deal by considering (a) the manner in which some notable political thinkers have dealt with the subject of State activity, and (b) the historical growth of the theory and practice of State activity.

### THE PHILOSOPHERS

The great political philosophers have either simply taken up a subjective position, and prescribed an absolute and highest good, and therefrom deduced the 'purpose' of the State; or they have generalized from history and pretended to see a 'purpose' therein, which they judge as good or bad, and which defines the extent to which the State ought properly to act. These two methods are not exclusive; the same philosopher finds that history supports his absolute good, and that the absolute good, strangely, is patent in all history.

Thus Plato seeks the Just State, or that in which all are happy, and is therefore obliged to prescribe for an army of Guardians, specially trained, without private property, and many other institutions, like the destruction of the family, some possible, others impossible of achievement.<sup>1</sup> So also Aristotle, but with a slightly different presupposition about the purpose of the State and consequently of its

<sup>1</sup> Republic, 416-20.

necessary institutions.<sup>1</sup> So down to our own times, people like Kant,<sup>2</sup> Humboldt,<sup>3</sup> Mill,<sup>4</sup> begin with some such proposition as that 'Nothing in the whole world, or even outside the world, can possibly be regarded as good without limitation, except a good character', and then proceed to argue that the State shall be Republican and Do-Nothing, while others, like the German Romantics, argue that the State is a 'great, energetic, perpetually-moving, living whole', and ought to 'serve every conceivable purpose'.<sup>5</sup>

Now we do not, and cannot, know the purpose of the State as a general and universal thing. For States differ according to time and place and the myriad circumstances of which their Statehood is composed. We cannot establish, save with speculative and mystical vagueness, the validity of any purpose or aim, such as we have here discussed, any more than we can discover the purpose of human life itself. The ultimate refuge of the thinker defending such propositions

<sup>1</sup> Aristotle, *Politics*, Book II, Chap. II, for his critique of Plato's doctrine.

<sup>2</sup> *Metaphysics of Ethics*: 'Nothing in the whole world, or even outside the world, can possibly be regarded as good without limitation except a good character', and cf. *The Principles of Political Right*, where freedom, the conditions of which ought to be provided by the State (and only those conditions ought to be provided) is shown to lead ultimately to the Perfect Generation.

<sup>3</sup> *Über Wesen und Zweck des Staates*; translated, 1854, as *Sphere and Duties of the State*. Cf. Chap. II: 'The true end of man, or that which is prescribed by the eternal and immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole. Freedom is the grand and indispensable condition which the possibility of such a development presupposes; but there is besides another essential—intimately connected with freedom it is true—a variety of situations. Even the most free and self-reliant of men is thwarted and hindered in his development by uniformity of position.' Hence, let the State do nothing, or next to nothing!

<sup>4</sup> 'Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every individual human being which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep: there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to remain uncontrolled either by any other individual or by the public collectively . . . the point to determine is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.' *Principles of Political Economy*, Book II, Chap. XI, 2. He expatiates upon this, and all his special discussions are coloured by this primary and overwhelming desideratum, the ultimate to which many other desirable things should be sacrificed if its realization is impossible otherwise than by such sacrifice.

<sup>5</sup> *Elemente der Staatskunst*, Edn. 1922, especially Lectures I to IV. The theme is this: 'The State is not merely a factory, farm, insurance company or mercantilistic society; it is the inner combination of the total physical and spiritual needs of the whole internal and external life of a nation to a great energetic perpetually-moving whole.' 'Order, freedom, security, law, the happiness of all, are sublime ideas for those who conceive them idea-wise; the State, however great and sublime, however comprehensive, however much it rests in and upon itself, does not disclaim to be considered, among other things, as though it existed only for one of these purposes; it is, however, too big, too full of life, to devote itself to one of these purposes exclusively and alone to please the theorists; it serves everything they want, it serves every conceivable purpose, because it serves itself.'

is in a personal scheme of human values, which may or may not at any particular time and in a particular place have been pursued. To postulate a 'purpose' or an 'aim' for the modern State is a dangerous proceeding: the possibilities of error are immense: at the most it is barely possible when confined to particular States, and the duration of the 'purpose' to a limited period. Even then, when all the modern oracles, with their babble of conflicting tongues, have been consulted—the Parliaments, the Kings, the men in the street, the Press, the laws and their preambles and clauses, the social philosophers, the novelists, the dramatists—when all this has been reduced to theoretical order and compactness, when confusion has been ruled out and the fundamental animation discovered, the intention must be confronted with fact: it is necessary to ask how much is so sincerely meant that it is actually executed? In any case, the formulations are so wide in their potential meaning, that they may be overturned by adversaries or invested with additional meaning by friends; and any two persons commencing with Happiness, Virtue or Justice, may proceed to such deductions, that two who are happy, or virtuous or just may end, as so many have ended, by ordering the incarceration, the ostracism, or the death of each other, on the grounds that the State is in danger.<sup>1</sup> These formulations take us no nearer the essential question: what is the State able to do?

These teleological conceptions are blinding, but they are also strongly dynamic. In the modern State, where democratic government is in operation, political parties base their programmes and promises upon such assumptions regarding the purpose and aims of the State. They deduce therefrom its proper activities and advertise them in the hope that the purpose will have so compelling a spiritual effect upon men and women that it will attract votes. And, of course, the acceptance by the voters of the programme is actually a step towards the realization of the purpose. Parties have their ideology and their historical generalizations as individual philosophers have.<sup>2</sup>

<sup>1</sup> Cf. *Abraham Lincoln, Address in Baltimore*, 18 April 1864: 'The world has never had a good definition of the word "liberty", and the American people, just now, are much in want of one. We all declare for liberty; but in using the same word we do not all mean the same thing. . . . Plainly, the sheep and the wolf are not agreed upon a definition of the word "liberty"; and precisely the same difference prevails to-day among us human creatures in the North, and all professing to love liberty. Hence we behold the process by which thousands are daily passing from under the yoke of bondage hailed by some as the advance of liberty and bewailed by others as the destruction of all liberty.'

<sup>2</sup> The best example known to us of the influence of such an historical generalization upon a party programme is that of Marx's doctrine (itself the product of a revolutionary mind working upon history through the medium of Hegel's dialectic), upon the Social Democratic Party of Germany. Not that similar connexions cannot be seen in other countries; but in this case the influence is, by hazard, singularly striking. In 1921, when the party was setting its house in order after the shocks of war and revolution, it was obliged to consider how far the old programme should be altered. But to alter a programme is necessarily to fall back upon the postulates and alter them. This was to rewrite Marx by 'rewriting history'.

One final remark may be added. The written constitutions of modern States all contain clauses—usually the Preamble—which purport to be the expression of the nation's 'purpose'. The American Constitution which was the earliest (1787) has a Preamble which runs : ' We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.'

It would be highly interesting to compare any particular interpretation of this, with many of the laws and activities of the American nation during the nineteenth century.<sup>1</sup>

### HISTORICAL

The history of State activity falls into three periods : the first, up to the time of Adam Smith ; the second, from the turn of the nineteenth century to about 1870 ; and the third, since 1870.

1. *To 1776.* Adam Smith's great work was the first systematic treatise inimical to State activity, and until his time it seemed the right and proper policy for the State, through Parliaments or Kings and their servants, widely to regulate human activities, and *laissez-faire*, indeed, appears as a brief exception in centuries of activity by the State. Before the Middle Ages, Princes and Kings sought to

<sup>1</sup> Preamble to : (1) *Constitution of the Swiss Confederation*, 29 May 1874 : ' *Volunt affermir l'alliance des Confédérés, maintenir et accroître l'unité, la force et l'honneur de la Nation suisse, a adopté la Constitution fédérale suivante* ' ; (2) *Act of Parliament establishing the Constitution of the Commonwealth of Australia*, 9 July 1900 : ' Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established : And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen : Be it therefore enacted . . . ' ; (3) *The Constitution of the German Empire*, 16 April 1871 : ' His Majesty the King of Prussia in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Wurtemberg, His Royal Highness the Grand Duke of Baden and His Royal Highness the Grand Duke of Hesse and by Rhine, for those parts of the Grand Duchy of Hesse which are South of the river Main, conclude an everlasting Confederation for the protection of the territory of the Confederation and the rights thereof, as well as to care for the welfare of the German people. This Confederation will bear the name " German Empire " and is to have the following Constitution ' ; (4) *The German Constitution*, 1919 (Weimar) : ' This Constitution has been framed by the united German people, inspired by the determination to restore and establish their Federation upon a basis of liberty and justice, to be of service to the cause of peace both at home and abroad, and to promote social progress.' (5) *The Act of the Free State Constitution*, 1922 : ' Dail Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows : (1) The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of the Irish Free State . . . (Saorstát Eireann).'



regulate hunting and pasture rights, and the emergent State in the manorial system and its variants arranged and enforced the rotation of crops. Safety from foreign foes and peace within the country were consciously planned; military organization was established; courts of justice set up. Roads and bridges were built and legal compulsion put upon local bodies of people to maintain definite stretches thereof, under penalty. Boundaries were demarcated, and stones set up as a sign.<sup>1</sup> All this was rudimentary in conception and execution by modern standards; but the intentions are evident: to safeguard life, to establish an order in economic processes upon which people could reckon, and which would avoid bloody and wasteful conflict, to create means of communication, to set up that first and essential element of property, social security. As industry and trade developed the central authority attempted to go further: inquisitions were made into the agricultural and other wealth of the country; the mintage of money was regulated by law; aliens, especially traders, were privileged and controlled, and made to pay special taxes. A tentative interference with foreign trade began. Prices of bread, ale, and cloth were regulated; and with prices, wages. The influence of the Church was tremendous, indirectly through its teachings and the prevailing state of belief, and directly because the earliest chief counsellors and secretaries of Kings were high dignitaries of the Church. The religious teaching of the 'just price'<sup>2</sup> had its practical manifestation in early industrial and commercial regulation and in the rules made by the guilds. How indeed could all this be otherwise in a nascent and religious society? And this development took place in England, and the countries that made up the modern France and Germany.<sup>3</sup>

At the first sketching out of nation-wide regulation—and it is premature to speak of any real *national* administration—the towns took up the tale with energy, concentration and detail. It was here, in the municipality, that State enterprise and control had its forerunner,<sup>4</sup> and provided the data of lessons for the future.

For about one and a half centuries from about 1400 to 1550 detailed

<sup>1</sup> Cunningham, *The Growth of English Industry and Commerce*, Vol. I, Vol. II, Part I, *passim*.

<sup>2</sup> Cf. St. Thomas Aquinas, *Summa Theologica*, 2a, 2e, q. 77a, 1–4, and see the discussion by Ashley, *English Economic History and Theory*, Vol. I, Chap. III; Tawney, *Religion and the Rise of Capitalism*, Notes on Chap. I.

<sup>3</sup> Boissonade, *Life and Work in Medieval Europe*, translated by E. Power, Book II, Chap. III; Cunningham, *op. cit.*, Vol. I, *passim*. Upon the civic authorities rested, 'the great substaunce of poletyk . . . provision, wise and discreet guydinge and surveying of all officers and others dependinge, concernynge the comune wele of the hole body of this worshipfull Toun and precincte of the same', cited W. J. Ashley, *op. cit.*, II, 8.

<sup>4</sup> Lipson, *An Introduction to the Economic History of England*, London, 1915; Tawney and Power, *Tudor Economic Documents*, Vol. I, Section II, *Towns and Crafts*, Numbers 8, 12, 17, 19, 20. Leonard, *The Early History of English Poor Relief*, Chap. III; Webb, *English Local Government: English Poor Law History*, London, 1927. Part I; Salter, *Some Early Tracts on Poor Relief*, London, 1926.

municipal operation prevailed, by the test of its own principles, not inefficiently.<sup>1</sup> It had all the necessary conditions in its favour. The municipality at its largest was not populated by more than ten or twelve thousand. Its character and possibilities could therefore be known without difficulties then insurmountable: it was a unit calculable and supervisable and manageable with primitive accounting methods, man and horse-power, and crude means of communication. Next, its vital and constituent parts were energetic self-governing organizations; they were willing that certain regulations should be made and executed, and their nominees formed part of the governing body, to establish rules and appoint officials, and therefore, obedient and self-governing, they were indispensable to municipal policy. Until the sixteenth century they vigorously existed. Town government as a whole, and the companies, acted within an almost closed and exclusive community. The town was the unit of loyalty. It had external rivals, but that very rivalry emphasized the oneness of its own members. It had not to fear that its arrangements would be disturbed and shattered by outside considerations, by other towns and the central authority: it could plan in peace and plan ahead, and this gave it economic benefits which naturally were further arguments for maintaining this exclusiveness. Exclusiveness had another side: a special independence and consciousness of solidarity; partly a spontaneous growth of fellow-feeling and the natural first thing to which people turned in the establishment and development of municipalities, and partly, too, the result of the teachings of the Church. This feeling of solidarity, whatever its main cause, whether the consciousness of kind in economic and social benefits in the dawn of town life, or the Church's doctrines,<sup>2</sup> as taught by a multitude of spiritual officials, who played a part in popular life far outreaching anything we know to-day, was fundamental to the operation of municipal activities. It caused men to do and to suffer: to minister and accept administration. Paradise and damnation ruled rights and duties; and council, company, official, craftsman, trader and consumer submitted to a common rule. Submitted: not always, nor every one,—but there was a consensus the world has not again known since the rise of religious doubt, the advent of the trading opportunities of the sixteenth century, and the development of national passions.

To those who erroneously believe that the modern State alone has essayed the task of positive action in a wide sphere, the town life of the fourteenth to the middle of the sixteenth century offers an emphatic contradiction. As soon as the wider territory now known as the nation, but then as the 'realm', 'commonweal' or 'kingdom',

<sup>1</sup> Cf. my article, 'State Activity before Adam Smith', in *Public Administration*, October, 1931.

<sup>2</sup> Troeltsch, *Die Soziallehren der Christlichen Kirchen* (*Archiv für Sozialwissenschaft und Sozialpolitik* (Vols. XVI-XVIII)).

attained to a state of settled organization in England, France and Prussia, and as soon as the rulers were firmly established on their thrones, what had been done in the narrow area of the town was attempted for the nation.

Soon the three great systems of State activity arose, Colbertism in France (preceded, however, by a good deal of State activity),<sup>1</sup> Mercantilism in England,<sup>2</sup> and Cameralism in Prussia and other Germanic States.<sup>3</sup> Trade and industry, manufactures and agriculture, prices and wages, apprenticeship and skilled craftsmanship were tightly harnessed in rules ministering to the prince's treasury,<sup>4</sup> the defence,<sup>5</sup>

<sup>1</sup> The motives were mixed: The Crown wanted money and men: it therefore sought to encourage economic activity expecting riches and population to follow: riches gave revenue and population, soldiers. Supervision would enable the luxury trades to be stamped out. If work were provided there would be social order, for vagrancy and mendicancy would disappear. When Louis XI, Francis I and Henri II were concerned with the silk manufactures of Lyons and Toulouse (1467-1554), they proclaimed their motive to be 'the very great good which could come therefrom to the public thing', in that men, women and children of all conditions who were without employment would be able to find therein a means of livelihood (Boissonade, *Le Socialisme d'état*, 1453-1661, p. 9). Measures of this kind—the regulation of prices, quality, manufactures, wages and such things—as numerous statutes declared, were designed to abolish 'changes and alterations and daily disputes' (ibid., p. 10).

Clement, *Histoire de Colbert*, 2 vols., Paris, 1892, is the classic work; Depping, *Correspondance Administrative sous le règne de Louis XIV*, Paris, 1850-5, and G. Martin, *La Grande Industrie sous le règne de Louis XIV*, Paris, 1899. Martin Saint Leon, *Histoire des Corporations de Métiers*, Book IV, Chapter III, Books V and VI; Levasseur, *Histoire des Classes Ouvrières et de l'Industrie en France*, 1789-1870, Vol. I, Chap. I, pp. 19-27; A. Babeau, *La Ville sous l'ancien Régime*, Paris, 1880, Book V, Chap. III.

<sup>2</sup> *Tudor Economic Documents*, edited by R. H. Tawney and E. Power, London, 1929; Cunningham, *The Growth of English Industry and Commerce*, Vol. II, 6th Edition, Cambridge, 1925. Cf. Mun, *England's Treasure by Foreign Trade*, written in 1630, published in 1664; many editions were published in the seventeenth and eighteenth centuries, when its influence was extraordinarily widespread and unchallenged. See Ashley's edition, 1895.

Beer, *The Origins of the British Colonial System*, 1518-1660, New York, 1908; Robinson, *The Development of the British Empire*, Cambridge, Mass., 1922; Hardy, *Histoire de la Colonization Française*, Paris, 1928; Abbot, *The Expansion of Europe*, 2 vols., London, 1919.

<sup>3</sup> Schmoller, *Umriss und Untersuchungen zur Verfassungs-Verwaltungs- und Wirtschafts-geschichte besonders des Preussischen Staates im 17 und 18 Jahrhundert*, Leipzig, 1898, I, 'Das Merkantilssystem in seiner historischen Bedeutung'; Weber, *General Economic History*, translated by F. H. Knight, London, Chap. XXIX, c; Marchet, *Studien über die Entwicklung der Verwaltungslehre in Deutschland, von der zweiten Hälfte des 17 bis zum Ende des 18 Jahrhunderts*, 1885; Roscher, *Geschichte der National Oekonomie in Deutschland*, München, 1874; Wolzendorff, *Der Polizeigedanke des Modernen Staats*, Breslau, 1918; Small, *The Cameralists*, Chicago and London, 1909.

<sup>4</sup> It is significant, though the significance can be over-emphasized in an age when the Departments of State were not yet so well differentiated and autonomously organized as they are now, that the Controller-General of France, that is the supreme financial officer, was then, even until the Revolution, the master of all departments and most importantly the supreme master of the Intendants in the Provinces (see Viollet, *Le Roi et ses Ministres*; De Marcy, *Contrôle des Finances*; Comte de Luçay, *Les Secrétaires d'Etat*, Vol. I). Fiscal needs and considerations dictated the course of trade and industry.

<sup>5</sup> An English petition of 1532 utters an everyday complaint: harbours important to the public weal and the safety of its navy had been ruined by the works of certain persons, 'more regarding their own private lucre than the commonwealth and suertie of this Realme'; Tawney and Power, *Tudor Economic Documents*, Vol. I, Section VII, 1.

the glory and the general welfare of the nation,<sup>1</sup> as that was conceived by the prince and his counsellor. Roughly for two and a half centuries, from 1550 to 1800, the process of controlling social and economic activities was most forcible and ever-extending in its scope and detail.

The State was everywhere active: in encouraging and discouraging industries, by prohibitions and bounties, privileges and monopolies; by sumptuary legislation calculated to cause the consumption of commodities whose increase was directly or indirectly productive of defensive or aggressive power; by legislation saying what might be worn, by the various orders of society; by religious persecution or toleration; what should be manufactured, what grown, what eaten and the manner of dwelling-place were dictated by considerations of National power. The fundamental emotions of the people were stirred and played upon by the rulers (we mean the Kings and their various advisers, usually a little knot of men of finance and of affairs, for the people were little more than pawns in the game) who themselves were under their sway: National aggrandizement, religious piety, the desire for internal order and obedience, charity, and the desire for personal glory, power and wealth mingled with these public and divine considerations.

Little by little the people were overlaid with a vast web of stern rules, and almost every action was subject to detailed regimentation.<sup>2</sup> The Prussian State of the late seventeenth and eighteenth century became the arch-type of *Polizeistaat* or police-State, the meaning of which is not that the State was policed in the narrow sense of the word, but that it was administered in the sense used by German administrators and thinkers to denote government—*Polizei* or (earlier) *Policey*.<sup>3</sup>

<sup>1</sup> Cf. citation in Clement, I, 282 n.: 'I know very well that in order to combat my opinion it is objected that if we take steps to do without foreign countries, they will do the same to us, that therefore it is more expedient to leave things as they were and have always been. But to speak in that way it is not necessary to be very well informed to know that we really have need of no one else and our neighbours have need of us. The kingdom has generally everything within it, with very small exceptions; but things are entirely different with surrounding States: they have neither wine, nor corn, nor salt, nor hemp, nor brandy, and for every necessity they must have recourse to us to obtain it. It would therefore be to profit very little from the good which God has done it if we give it away for things with which we can easily dispense. If we cannot avoid letting foreigners have our money, it ought not to be for anything but what comes from outside the kingdom, like spices, which have to be sought in far-off lands or to be obtained from the Dutch. As for the rest we must do without them and see to it that luxury does not tempt us to do so prejudicial to the State.' (From a volume attributed to Courtilz de Sandras, published in 1694, entitled *Testament politique de messire Jean Baptiste Colbert*.)

<sup>2</sup> This is treated with great acumen by Wolzendorff, op. cit.

<sup>3</sup> This meant according to the Cameralist Justi (Small, op. cit., p. 440), who spent a good deal of time upon its definition, 'The science governing the various occupations according to the purpose of the state.' The same writer said further, 'Two uses of the term *Policey* are common to-day; first and most generally, 'all measures in the internal affairs of the country through which the general fortune of the state may be more permanently founded and increased, the energies of the state better used, and in general the happiness of the community promoted. . . . In the narrower

Its quintessence was State regulation over as wide a field of life as the rulers believed themselves justified in controlling ; and in the nature of the Germanic States of the eighteenth century, in the nature of the political thought, the economic needs and the metaphysical background, this implied State activity on a very wide scale.

**Eighteenth-Century Benevolence.** The age of enlightened and benevolent despotism<sup>1</sup> spread everywhere. But the Cameralists supplied two things lacking elsewhere : (1) a logical and detailed programme for the application of the essential doctrines ; they maintained a tradition, developed further an already long series of treatises, and taught the old and the new to generations of students at the Universities,—and (2) they also insisted, as never elsewhere, upon an administrative organization and a civil service with qualities deliberately adapted to the work.<sup>2</sup> The Prussian people thereby enjoyed a State that was well and honestly administered, though the virtue was relative ; but they were obliged to suffer restrictions which became so galling that poets and dramatists cried out against them in works which achieved the widest popularity. The full doctrine of the Police State or Benevolent Despotism is to be found in the works of Christian Wolff. Its doctrine is also the commonly accepted code of France and England in the same century ; but in England the doctrine of State activity was not extended and carried out as in France and Russia (and Austria), because while these countries had a professional civil service spread over the country and actuated by the central authority, England carried out her policy of State interference mainly with reference to foreign trade and the acquisition and development of colonies, while her domestic administration was, in its higher branches, given up to the mercies of the ignorant, slothful and corrupt, and unpaid officers and J.Ps. of towns, counties and parishes, and the foppish wastrels and their underlings in Westminster and Whitehall.

**The Foundations of Success, and its Price.** What were the spiritual foundations of these systems of State activity, and what practical effect did they have ? The first question is easily answered, that is, it is easy to enumerate the influences though it is difficult to ascribe to each its proper weight. The State was new, it had but

sense we understand by *Policey* everything which is requisite for the good ordering of civic life, and especially the maintenance of good discipline and order among the subjects, and promotion of all measures for the comfort of life and the growth of the sustaining system' (Nahrungsstand). Small, op. cit., p. 440, translates this term 'sustaining system', but I cannot make any sense of such a translation. I believe that wealth-producing class is what Justi meant.

<sup>1</sup> Wolzendorff, op. cit. ; Ardascheff, *Les Intendants de Province sous Louis XVI*, Paris, 1909, pp. 195, 213 footnote, p. 213 : '*L'amour de la patrie, l'amour du bien public, dit un contemporain, est une phrase qui est trouvée dans la bouche de tout le monde*' ; p. 213, footnote (41), '*Le mot de bien faisance est moderne et il n'y a pas un demi-siècle qu'on entendait, en parlant de la charité, qu'un acte de devotion est le produit d'un sentiment religieux*' (Moheau, *Recherches sur la population*, II, 51 note).

<sup>2</sup> This is treated in detail in Part VII of this work, on *The Civil Service*.

recently emerged out of the agonies of combat, and even in the eighteenth century the process of violent aggrandizement was not yet ended. In such a condition men's fears of authority, and their patriotic hopes in it, form a reservoir of energy from which sacrifices can be obtained, even if those sacrifices are not strictly related to the aims and ends of conquest and defence.<sup>1</sup> Restrictions which would not be brooked in the ordinary state of peace and peaceful mind, when the temper would grow impatient in the normal course of industry and life, are pressed forward by the body of psychic forces to which we give the collective name Patriotism, and the burden becomes a joy. All this is bound up to some extent with the person of the King who, everywhere the conqueror of the Pope, is said to be the Victorious, the Wise, the Peace-maker, or the Saint, *Gloriose, Serenitas, Clementia*, the Magnificent, the Great, the Just, or Very Christian, the Philosopher, and *Dei Gratia*, who certainly lives in an atmosphere, and amidst a ceremonial, in which all virtues are magnified, while vices are sedulously hidden from the contemporary populace to enrich the reading of a later generation.<sup>2</sup>

The State entered a field in which the extent of its territory and population was a singularly important condition of success in the things men wanted: international mercantile and colonial success, and the regulation of domestic conditions to ensure this.

The sense of solidarity, we may even say the sense of State, which had enabled the municipality to frame and execute its regulations, became in the sixteenth and seventeenth centuries a national consciousness. The generation and strengthening of the national spirit in the struggles between Pope and State, the break-down of the old settled order by the Renaissance spirit, the awakening of enterprise and acquisitiveness by the discovery of lands and wealth in the Far East and Far West, gave the power of attracting and directing human energies to the only unit big enough to enter into a struggle for possession, the nation, with its area and population extended as far as possible. Even now, in an age of machine-guns, the world reckons in man-power; how much more so when the only mobile energy available was contained in the sinews of men and horses. The state

<sup>1</sup> Cf. the impetus to the adoption of the Constitutional Amendment (18) on Prohibition in the U.S.A. towards the end of the Great War.

<sup>2</sup> Figgis, *Studies in Political Thought from Gerson to Grotius*; Carlyle, *A History of Medieval Political Theory in the West*. Bossuet portrayed its features: God had established Kings as his ministers and through them reigned on earth, and for God they acted for the good (Bossuet, *Politique tirée des propres paroles de l'Écriture sainte*, Livre III, art. 2). 'The power of God makes itself felt instantaneously from one extremity of the earth to the other, and thus, too, does the power of the King act all over the Kingdom. The royal authority holds the whole Kingdom in order, *en état*, as God holds the world in order. From the prince all orders flow: they cause magistrates and captains, citizens and soldiers, provinces and armies by sea and by land to act in concert: the prince is the image of God, who, seated on his throne in the highest heavens, makes all nature function.'

of mind was one in which the desire for national power mingled with the sheer incomprehensibility of individual freedom, which might or might not have been regardful of the necessary power of the State. In England the evolution of the desire for power is marked clearly by the reign of Henry VII; of him Bacon has said that 'he bowed the ancient policy of this realm from consideration of plenty to consideration of power'.<sup>1</sup> Now flourished the *raison d'état*.

Further, in the infancy of an organization, things are done and suffered which maturity alone can condemn and amend. What was the alternative? The very things which men feared and hated—localism, ecclesiastical strife and oppression by tyrannical individuals and overlords. The choice among alternatives can only come when there are alternatives theoretical or actual, and at the origin of things there are, by hypothesis, none. The State enjoyed the benefits of an almost complete consensus of opinion. This itself was only part of a much wider state of mind, that of the Ages of Faith. The Church was still the paramount educator of youth, the English State, indeed, gave the Church of England the monopoly of it.<sup>2</sup> 'Man', in Kant's words, 'had not yet made his exit from the state of his self-made minority.' Church and Princes were rarely questioned.

Two other conditions which produced State Activity require emphasis: the fiscal needs and policy of the government; and the pressure of commercial and industrial people who pursued their own interests consciously or unconsciously under cover of claims that the nation would benefit.<sup>3</sup>

Even as these conditions secured for the State that general obedi-

<sup>1</sup> Cf. Bacon, *History of Henry VII*, Works VI, p. 95 (London Edition, 1870); Cunningham, op. cit., I, 479, 480.

<sup>2</sup> Cf. Adamson, *History of Education*; Fiske, *The Beginnings of New England*, London, 1889; Parrington, *Main Currents in American Thought*, Vol. I, 1620-1800, *The Colonial Mind*; Aubertin, *L'esprit public au XVIII<sup>e</sup> siècle*, Paris, 1873.

<sup>3</sup> The first condition is quite patent in French policy and in German Cameralism; the royal treasury and its deficits were the measure of State interference. In these countries, however, the rulers did not let themselves be swayed by the interests of their mercantile classes which were less important than in England. State activity was, indeed, the activity ordained by the legal governors of the State; and the secret or open influence of others was strictly subordinated to public policy, especially as this so often coincided with the fiscal needs arising from the wars and the prodigal court life (the latter in France, more than in Prussia) of the seventeenth and eighteenth centuries. In England, the second condition, the pressure of the mercantile classes, played a greater part in moulding State activity. The merchants, besides being powerful because they were rich, had the ear of the governing councils directly or indirectly because they had representation in Parliament. The City of London played a greater part in the life of England than Paris in France, or the various capitals of the Germanic States in the surrounding areas. Merchants thronged Westminster and the Palace (they found places on the Board of Trade), and they, and the great families, so far from being subordinate to the Crown, had in 1688 subordinated the Crown to themselves, and they moulded State activity because they had seized the State from the Crown, and had not yet themselves become subject to the whole people. Cf. Andrews, *Councils and Committees of Trade in the Seventeenth Century*.

ence which is its very life, others were arising which eventually penetrated Leviathan, and dispersed its ancient elements.

Another question has yet to be answered. Were the regulations effective ; how much success did they have ? What hindered that success ? No answer can be given until the question is made more precise. When we ask, did they achieve their object ? there is the broader object and the narrower. The broader object was said to be national strength obtained through national wealth. But this aim is constituted of a tremendous number of ingredients, the balance of trade, the increase of population, the manufacture of certain articles in sufficient quantities to ensure adequate defence in war, and so on. No exact inquiry has ever been made into the effect of mercantile regulations upon these things. We know generally that all countries prospered ; but the causes of prosperity, like the growth of knowledge and the increased international division of labour, were so powerful that enrichment was possible even if the regulations were economically unsound. It is certain that all countries lost much in aggregate welfare, in order that they might be well-off in some particular aspects, in the possession of certain manufactures, of colonies, and, in the case of France and England, of large and well-equipped navies. This, too, is certain, that we cannot find any widespread challenge to the policy. Whether these things could have been obtained with less expenditure and dissatisfaction is another question, and one that has not been answered by economic historians in the kind of detail which alone would be useful to us. An incessant struggle was needed for success. There was no general spontaneous obedience to the demands of the State, and the State was compelled to explain itself and reprove its citizens or officials in preambles to statutes and in circulars, and thus secure obedience.<sup>1</sup> Statute after statute complained that the previous ones had not been properly kept. Numerous officials were necessary ; and in all countries customs officers became the watchdogs of import and export regulations, and were perhaps the best hated of all.<sup>2</sup> But the inspectors of industries of various kinds were not less detested and deceived wherever possible. In France and Prussia State activity at home was taken seriously<sup>3</sup> and carried out by professional administrators, in Prussia by expert and specially trained men, while the central authority maintained a strict and continuous and almost vindictive superintendence over its agents. In England

<sup>1</sup> This is observable in the English Statute Book, and though the preambles were originally remnants of the petitions by Parliament to the Crown for the grant of redress, they continued into a later age when they were made to subserve a different purpose. In France in the eighteenth century ordinances and laws, central and local, were given preambles deliberately designed to teach and persuade the public. Cf. Ardascheff, *op. cit.*

<sup>2</sup> See below, Part VII, no *Civil Service*.

<sup>3</sup> Schmoller, *op. cit.*, VIII, *Die preussische Seidenindustrie im 18 Jahrhundert und ihre Begründung durch Friedrich den Grossen*.



amateurism prevailed in the local Justices, and the government of the towns, and the poor-law in the eighteenth century is an eloquent testimony to its insufficiency at that time and in the circumstances, and an illustration of the fact that the success of the activity of the State like that of any individual depends upon the ability and character of those who perform it.<sup>1</sup> English commerical policy was successful through unscrupulous sacrifice of Ireland, victorious wars which brought rich colonies, and the favourable maritime situation of the country. To this success the Navigation Acts contributed. Success was bought by methods which had not taken into account an ultimate possible loss—the loss of the American Colonies and all that came of that in war, commercial embargoes, and destruction of shipping. The State can often win its way, as a private individual can, if it is ready to make the future pay for the present, and nation as well as individual may accidentally stumble into such a course without deliberately intending to set present gains and losses against those of the future. If Colbert, Cromwell, Grenville, Frederick the Great, the Kings of France and their counsellors could have foreseen all the consequences of their policy they may have pursued other ends, but such knowledge is possible only when experience and science are at hand to teach, and even these have their limitations: in proportion to their magnitude, the activity of the State is seemingly successful until the day a reasoned balance is struck.

The activity of the French State was more or less successful, but at what cost? Its officials were recruited in an infamously wasteful fashion: for men like Colbert came but once in a generation.<sup>2</sup> The peasantry, whose agriculture was deemed inferior to the glory of manufactures, commerce and colonies, was so oppressed that the only possible issue was violent Revolution; the crude repression, fines, imprisonments, litigation, developed a mistrust and hatred of public administration hardly eradicable, it seems, even now, from the Frenchman, however much he may agree with State activity as a theory; and, according to some authorities, weakened all trust in self-government.<sup>3</sup> But these are great prices, though there is no way of reckoning them in francs. Further, several generations of French men, women and children were obliged to live under a restrictive régime which, as far as we can tell, diminished the total aggregate welfare possible in a spontaneously developing individualism. We may ask, too, would not manufactures and commerce, if left to themselves, have better satisfied the originators of restrictive schemes, if these could have observed the long run outcome?

<sup>1</sup> Cf. the Webbs series on English Local Government and the History of the Poor Law.

<sup>2</sup> See below, Part VII, *Civil Service*.

<sup>3</sup> Thus De Tocqueville, *L'Ancien Régime et la Révolution*, Paris, 1856, and Buckle, *History of Civilization in England*.

**The Downfall of State Activity.** When men had experienced these things for a couple of centuries they began to doubt their wisdom. Opinion became rational and individualistic; where, before, it had been traditional and social, it now became, to use a term which has passed into quite general currency, utilitarian. The Absolute Good, whereby men judge of temporal things, changed its nature: until the middle of the eighteenth century it had been an end inseparably connected with that social grouping called the State; now the Absolute Good became charged with individual values.<sup>1</sup> The Enlightenment spread: people ceased to believe, as before, in miracles, books abounded on the Order of Nature, wits like Voltaire laughed royal and religious nonsense out of men's hearts, philosophers like Christian Wolff (whose work began with a picture of the Rising Sun spreading its enlightening rays upon a world dwelling in obscurity) systematized the results of this mental revolt. The world quivered with a new excitement at Schiller's Herculean strokes which laid bare the pretences and baseness of political rulers. Rousseau conceived of society as originally atomized (if society is possible when it thus originates). But what was most important was the emphasis placed upon the individual man as the sovereign creator of the State. Kant himself crowned all by his worship of man's rational nature, and, catching fire from Rousseau,<sup>2</sup> dedicated his talents to the gospel of Progress achievable in the State through man's dynamic and unfettered reason. In England Locke had created a set of doctrines which compelled men's everyday thought and behaviour; the State was posterior to the welfare of the individual, and its sovereign power properly limited by the will of its individual members. Hume's sceptical mind paved the way for social teachings even more shattering to the pretensions of the State than Locke's. In brief, however much all these thinkers differed among themselves, they collectively encouraged a belief that more freedom for the individual and less State activity would be socially fruitful, and, second, that man, guided by individual reason and untrammelled by authority, would, by the unfolding of his nature, attain to a state of perfection. This second part of the general belief we know as the doctrine of Progress. These beliefs have suffered strange vicissitudes since their formulation, but they still nominally rule modern society and statecraft.<sup>3</sup> We have to ask what influence they had upon the development of State activity.

<sup>1</sup> Bonar, *Philosophy and Political Economy*.

<sup>2</sup> Cf. Basch.

<sup>3</sup> Kant, *The Principle of Progress* (Part III of *Principles of Politics*, translated by W. Hastie, Edinburgh, 1891; Condorcet, *Esquisse d'un Tableau historique des progrès de l'esprit humain*, 1795). On the whole history see Bury, *The Idea of Progress*, with which compare C. Bell, *Civilization: An Essay*, London, 1928; Spengler, *Der Untergang des Abendlandes, The Decline of the West*, 2 vols., translated by C. F. Atkinson, London, 1928.

At different stages and in different places they had different effects, their first general effect being to encourage practical and theoretical movements subversive of despotic though 'benevolent' government. The chief systematic contributors are the Physiocrats and Adam Smith.

**The Physiocrats.** The French *Économistes*, called also the Physiocrats, formed the first school of thought to break with Colbertism and Mercantilism. Their system, in so far as it concerned the problem of State activity, reposed upon two pillars: the faith that agriculture was the only true productive work, and manufactures and commerce of like value, and that individual choice was of higher worth than State regulation. All commerce and manufactures were, to them, unproductive, and, therefore, all encouragements thereof were social waste, especially if they were paid for by burdens upon agriculture. Agriculture alone produced; only agricultural peoples had the most desirable qualities: they had pure morals, they increased the population, they made good soldiers. Agriculture was the occupation of the majority of the nation and provided the greater part of the royal revenues. While it thrived—and it could easily be made to thrive—recent English agricultural progress proved this—the nation would always have a good supply of food, but without it the raw material of all industrial activities would be lacking. No other form of economic activity returned a *net product* over and above the labour and capital put into it.<sup>1</sup>

Existing restrictions in France discouraged agriculture instead of encouraging it; for had it been free it could have driven good economic bargains with the industrial population and so have effectively reduced the value of the privileges manufactures obtained from the State. About the middle of the eighteenth century the best political and economic minds in France seemed all at once to be seized with a question terrible for all systems and States: 'Is all this really necessary!'<sup>2</sup>

Officials like Vincent de Gournay, famous for the recoinage and the popularization of the phrase '*laissez faire, laissez passer*,' helped the spread of economic theory, by encouraging the publication of treatises and translations from the English, himself undertaking those of Child

<sup>1</sup> See Oncken, *Oeuvres économiques et philosophiques de F. Quesnay*, Paris, 1888; G. Weulersse, *Le Mouvement physiocratique en France*, 2 vols., Paris, 1910.

<sup>2</sup> Montesquieu, *Esprit des Lois* (1748); Dupin, *Mémoire sur les blés* (1749). Dupin was the outstanding *fermier-général* of his day; Rousseau, *Discours sur l'inégalité* (1749); Buffon, *Histoire naturelle* (1749); Mirabeau, *Mémoire sur l'utilité des États provinciaux* (1750); first volume of the *Encyclopédie* (1751). The *Journal économique*, sponsored by Malesherbes, commenced publication in 1751. He complained that there were many truths contrary to the system of administration in France, which everybody—the educated, uneducated, labourers and artisans—uttered day by day, but these were not printed. G. Weulersse, *Le Mouvement physiocratique*, I, 27, footnote.

and Joshua Gee, early free-traders. All in all, as Voltaire said, 'about 1750 the nation, surfeited with poetry, tragedies, comedies, operas, novels, romantic histories, and even more romantic moral reflection, and theological disputes over divine grace and convulsions, began to reason about corn.'<sup>1</sup>

The second tenet of the Physiocrats was freedom of trade from State encouragement or discouragement. Freedom of the individual to go where he liked, work where he liked, buy and sell what he liked at the price obtainable by free bargaining, provincial and international frontiers notwithstanding. The gospel was bound up with their theory of property. To them the individual right to property in its most absolute sense was indeed fundamental, for this was the motive force of economic activity. Mirabeau, the Friend of Man, identified property rights with 'the necessity of opening to the activity of the individual a free career, an unlimited field'. 'This which is mine', he said, 'is the entire universe.'<sup>2</sup> Nothing must force this right, and the State's only business was to see that this principle was respected. For freedom to dispose of possessions was justified by the economy of agriculture which required the intense application of the acquisitive and preservative dispositions of man. The right of bequest encouraged men to work for ends attainable only beyond their own generation, and plans made long ahead and works erected for future benefits were the essentials of agricultural economy. The tools and capital needed would find their best use if they were left to the free disposal of those who had an immediate interest in their most gainful application. Of all forms of property, property in one's own person, the freedom to work, when, where, and how one liked, was the most indispensable: '*La terre ne peut fructifier que sous la main des hommes libres*.'<sup>3</sup>

Here then was logical consequence: a theory of almost complete State inactivity. Grimm fulminated against the madness of regulating everything, '*la fureur de trop gouverner*'; and d'Argenson had set up as the highest maxim of government, '*Pas trop gouverner!*' Don't govern too much!

However, it was not sufficiently convincing to say that property and liberty made for the best social good through agricultural production; it was still necessary to show how this came about. What was the motive force in individual human beings of such a potency and direction that it could be left to operate without State control? The answer, in brief, was this: 'no individual human being can seek his own good, his own personal interest, without at the same time producing the public good.'

Society need not fear harm or disruption; for 'every one works for others, in believing that he works for himself'.<sup>4</sup> This comes about

<sup>1</sup> Cited Weulersse, op. cit., I, 25.

<sup>2</sup> Ibid., II, 14.

<sup>3</sup> Ibid., II, 5.

<sup>4</sup> Ibid., II, 96.

because beings realize the need for reciprocity : in order to satisfy their own appetites they are obliged to concede certain satisfactions to others. The pursuit of our own interests teaches us our rights, and, at the same time, our duties towards others.

Yet what is to prevent this individual pursuit of satisfaction from causing subversion, misery, anarchy ? For not all men are good, nor is their wisdom remarkable. The Physiocrats answer : the interest of the individual, and its pursuit, must be *enlightened*, that is, he must be taught a philosophy of his own best interests and the natural possibilities of their satisfaction.

Government's part is to leave men alone ; at the most it is to recall men to an enlightened view of their interest ; and this is to be learned from the nature of things and of men. The State is properly limited to guaranteeing security, property, liberty, and to the declaration of the principles of the social order discovered by philosophers.

The last few ideas deserve closer examination. Upon what ultimately did the Physiocrats base their convictions ? It is hardly enough to say that men's interests are such and such and issue in certain kinds of behaviour. Where is the proof of this ? The Physiocrats answered this question by pointing to the physical order of the world. All things operated according to natural laws. The human bodies which Quesnay poked about in his capacity as Court Physician were perfect types, and not isolated types, of a natural order of human life in society. As for the body there were laws of health, i.e. generalizations from observed facts about health which human agency could not alter, which indeed mastered the human will, so, for social life, there were such laws, the product of nature itself, and vain was it to seek their alteration by the capricious, ignorant intervention of individual or social agency. 'Nature', said Quesnay, 'is the universal hygiene.' Indeed, the systematized text-book of the physiocracy was aptly entitled *The Natural and Essential Order of Political Societies*.<sup>1</sup>

The Physiocrats were like all who have scrutinized the face of the heavens and discovered a God with whose promise and behaviour they are intimately acquainted : admitting that He is all-powerful and all-wise, they will not let Him attend to His business alone. And, if men cannot learn His ways, they must be taught by those who pre-

<sup>1</sup> Cited Weulersse, op. cit., II, 112. *L'Ordre Naturel et Essentiel des Sociétés Politiques* 1767, by Le Mercier de la Rivière (I use the edition of 1910 by E. Depitre). The sanguine and utter conviction of the Physiocrats that they had discovered the perfect truth about the causes and effects of social life is amazing. Men were governed by sovereign immutable and irrefragable laws, the laws of *things* (Mirabeau, see Weulersse, op. cit., II, 111). Observe the goings and the comings of men, the march of the seasons, the rain, the dew and the sun in the proper time, and the laws of this perennial and beneficent recurrence will write themselves plainly upon your mind. Should you need a concise guide to them, call in an able Physiocrat, he has them at his fingertips.

tend to know them.<sup>1</sup> What, then, did the Physiocrats teach as to the activity of the State? Since the laws were graven on the face of nature the legislator could not create laws, he could but declare them. The State should be no more than tutelary, securing property and liberty and explaining why it did so, for these explanations would bring home to citizens the *Ordre Naturelle*. 'Liberty and immunity are the best administrators', and 'Government has practically nothing to do except to dispense itself from doing anything'.<sup>2</sup> This was the logical and seriously held consequence of the Physiocrats' genuine belief in their natural laws: Grimm once said, 'All the laws required to secure the prosperity of a vast empire can be included in 50 or 60 pages'.<sup>3</sup>

Yet the Physiocrats were trapped in their own essential order, and at one point the inexorable laws exacted from them a heavy toll. In order that men should get to know the essential order and that Kings (or any form of government, for to forms the Physiocrats said they were indifferent) should submit to the inexorable laws, *the public authority was to undertake free and compulsory public education*. Quesnay had said that opinion governs, and that one must therefore operate upon opinion. Education was the first, the essential and sublime duty of the sovereign.<sup>4</sup> For *évidence publique* was the force which the Physiocrats supremely trusted. What Witness or Testimony was to religious belief and government, that was *évidence publique* to them: the Word which persuades and convinces, and therefore governs. In the following century Progress, Science and Representative Government took its place.<sup>5</sup>

Though the Physiocrats were lamentably in error they had added at least two ideas of extraordinary importance to the science of State activity: the idea of a natural order of social behaviour which determined the proper scope and manner of governmental action, and the theory that, if the individual were left untrammelled, the greatest

<sup>1</sup> This also was the doctrine of those responsible for the Inquisition, American Prohibition, health administration, factory legislation, etc., etc.

<sup>2</sup> Thus, Mirabeau, cf. Weulersse, op. cit., p. 40.

<sup>3</sup> Correspondence, 1 July, 1764: cited Weulersse, II, 43. Du Pont de Nemours went further than most of his colleagues when he allowed that the State should undertake poor-relief and public works like roads, bridges and canals, but even he was lukewarm about all save public education by the State. Cf. *Du Pont de Nemours et l'École physiocratique*, by G. Schelle, Paris, 1884, p. 114 et seq.

<sup>4</sup> Quesnay, *Droit Naturel*, Chap. V.

<sup>5</sup> The theorists were as good as their word: at first in the *Journal de l'Agriculture* and later, from 1768-77, in the *Éphémérides du Citoyen*, a monthly journal, they carried on the public dissemination of their doctrines. When it was under the editorship of Baudeau, its founder and proprietor, its title was *Chronique de l'Esprit national*; under the Physiocrats it became *Bibliothèque des Sciences morales et politiques*. Du Pont, its first editor under the new arrangement, unfortunately allowed the natural order of his own constitution, which was inveterately procrastinating, so to overcome him that he had to be removed by his fellow-Physiocrats, whose natural and essential order produced in them the resolution not to let the Journal fail in its purpose.—G. Schelle, op. cit., Chap. V.

social good would result. In the first idea they themselves erred in believing that they had arrived at the complete truth, or even at the truth in the part which they had investigated. They too narrowly identified their personal beliefs with the designs of Nature. Secondly, their optimism was unlimited and inveterate. The most impossible explanations were invented in order not to let down the beneficent intentions of Nature acting through individual self-interest. And yet the doubt remained. Indeed, this doubt was so ineradicable, that the Physiocrats themselves threw up the sponge, and admitted that there ought to be limits to State inactivity, and that the chief limit was State education. A damnable, but necessary heresy!

These theories did not influence French government very much. Only with the Revolution itself was there a snapping of ancient threads and a throwing off of oppressive burdens.<sup>1</sup>

**Adam Smith.** In 1776, a few years after the zenith of physiocracy, appeared the work which was to exercise an influence more profound, extensive and lasting—Adam Smith's *Wealth of Nations*. Smith thought highly of the Physiocrats, though he recognized and denounced their cardinal errors.<sup>2</sup> He was at one with them in their theory of human nature in society, on the existence of economic laws, and the inability of government to bring about the welfare of society better than could the untrammelled individual. He made mincemeat of the mercantile system. He showed that on its own principles it was ineffective and wasteful, and again, that those principles reduced the potential wealth of nations.<sup>3</sup> Wherever the government put its finger it paid more than it obtained: and some classes lost more than any other classes gained.

Governments could not judge where human beings could best apply their work and capital. Only the individual, in his special situation, could best judge this. The argument rises to its highest burden in the passage upon the 'invisible hand', quoted below.<sup>4</sup> This, and like

<sup>1</sup> Sagnac, *La Législation Civile de la Révolution Française* (1794–1804), Paris, 1898; Cahen and Guyot, *L'œuvre législative de la Révolution*, Paris, 1913; see also Taine, *L'Ancien régime*, 15th edition, Paris, 1887; *ibid.*, *La Révolution*, and Faguet's excellent essay entitled '*Socialisme et la Révolution Française in Problèmes Politiques*'.

<sup>2</sup> Cf. Introduction, Cannan's Edition of *The Wealth of Nations*, 2 Vols., London 1904; J. Rae, *Life of Adam Smith*, London and New York, 1895.

<sup>3</sup> In the first analysis he proved that the regulations were ineffective because they were circumvented by fraud and smuggling, the consumption of substitutes, and the use of alternative means of transport and re-transport; the producers it was intended to benefit were often injured, for, as in the case of corn bounties, natural adjustments in trade gave the benefit to the merchants and not the farmers. He showed how special classes—the traders most of all, for whom he reserved the specially acrid vials of his wrath—created monopolies against their countrymen. 'The sneaking arts of underling tradesmen are thus erected into political maxims for the conduct of a great empire; for it is the most underling tradesmen only who make it a rule to employ chiefly their own customers.'—*Wealth of Nations* (Cannan's Edition), I, 457.

<sup>4</sup> *Wealth of Nations*, Book IV, Chap. II: 'As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry and so to direct that industry that its produce may be of the greatest value;

phrases, have produced the error that Adam Smith was the creator of *laissez-faire*. But he was in fact too clever to surrender to the utter inactivity of the State proposed by the Physiocrats. He recognized that a State has other needs besides material welfare, such as defence and instruction, and these may not be attainable in the undirected higgling of the market. He objected, quite pertinently, to the Physiocrats: 'If a nation could not prosper without the enjoyment of perfect liberty and perfect justice, there is not in the world a nation which could ever have prospered.'<sup>1</sup>

Indeed, Adam Smith allowed the value of quite a large field of State activity.

'According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance, indeed, but plain and intelligible to the common understanding; first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of it, or the duty of establishing an exact administration of justice; and thirdly, the duty of erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain: because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.'

And the next chapters of the book are given to a detailed analysis of the expense connected with each of these functions.<sup>2</sup>

Adam Smith's work has had a tremendous vogue, and its native virtue was enhanced by economic and political conditions at the time of its publication. Through the channel of Göttingen University the *Wealth of Nations* percolated into Germany; *Smithianismus* became a cult, while the book was likened to the New Testament in its social significance.<sup>3</sup> In England a Prime Minister avowed in the House of Commons his faith in its principles. In France Jean-Baptiste Say

every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it.'

<sup>1</sup> *Wealth of Nations*, Book IV, Chap. IX.

<sup>2</sup> *Ibid.*, Book V, Chap. I; see also *Lectures on Justice, Police, Revenue and Arms*. Edn. Cannan, Oxford, 1896.

<sup>3</sup> Roscher, *op. cit.*, Chaps. 25, 27, 32; E. v. Meier, *Französische Einflüsse auf die Staats- und Rechtsentwicklung Preussens im 19. Jahrhundert*; Hasek, *The Introduction of Adam Smith's Doctrines into Germany*, New York, 1925.



systematized, with national clarity, the work of the master. The world believed itself given over to *laissez-faire*.

The world need neither have rejoiced nor feared inordinately. Bad conditions themselves bring about reforms, and good conditions maintain themselves. In England some important fiscal reforms were accomplished by reason of the conditions, and by about 1846 hardly a vestige of the mercantile system was left. In Germany a small measure of local representative government was established, and the emancipation of the servile agricultural population was begun. In France, free peasant proprietorship was inaugurated and trade and industrial corporations abolished. But all these things were not merely Smithian. It has been shown, for example, for Prussia, how many other currents contributed to that strong stream which carried away the ancient controls.<sup>1</sup> Stein's was an independent creative talent at least on a par with Adam Smith's.

*Laissez-faire* was never an absolute rule of government, nor even approximately absolute, or the governments would have been forced to action in at least the three directions indicated by Adam Smith. Between 1776 and 1876, at which later date a new impulse towards State activity successfully emerged, all governments made laws at great speed, on numerous aspects of social life, and saw to it that their rules were executed. There is no fiction so misleading as that which looks back at the early nineteenth century and says it was an 'era' of *laissez-faire*.

In France, after the abolition of State control in economic matters in the first raptures of Revolution and Restoration, dangerous and unhealthy industries were regulated, and as soon as the consequences of the industrial revolution, which came later in France than in England, began to loom large, that is by about 1860, the State began to assume more and more activities in relation to them. The first great theoretical reaction was commenced against Smithian doctrines in Germany. The most systematic of the Romanticists, Adam Müller, refuted the doctrine of the 'invisible hand' point by point, and showed very clearly to what social evils unregulated industrial revolution tended.<sup>2</sup>

There was merely a pause while civilization developed, the agricultural eighteenth century being pushed out of the way and the steam-driven nineteenth rolled in. Only the obsolete was left alone or demolished; the new and desirable was at once harnessed. In proportion as the full potency of the new energies was revealed, and as the creatures of its titanic force were moulded and emplaced, promising a magnified weal or woe, men lost interest in a Natural Order which left things to run amok, and demanded deliberate regulation. For the

<sup>1</sup> E. v. Meier, op. cit.; Lehmann, *Freiherr vom Stein*, 3 Vols., Leipzig, 1902.

<sup>2</sup> Cf. Müller, *Abhandlungen*; and cf. Spann, *Types of Economic Theory*.

Natural Order had been overtaken now by a Machine Order. State inactivity, which the Natural Order and the *Wealth of Nations* had advocated, was carried out, mainly in international trade, as far as England was concerned. The leaders of manufacturing industries were creating fortunes, factories, and power : and, as a sequel, they created schools of thought and instruments of agitation claiming freedom. In England the so-called Manchester School was established<sup>1</sup>: Radicals with doctrines drawn from Smith and Bentham. Smith argued free trade ; Bentham argued that men best knew their own interests, and that the best government was representative government, which included *all* interests. The Anti-Corn Law League was its chief bloom, and anti-State interference in the regulation of working conditions another. Its influence has only of recent years been seriously counteracted.<sup>2</sup> In Germany, the German Manchester School, *Manchestertum*, had no more than a very few years of authority.<sup>3</sup> In France, despite brave protestations, very little was done to break down the network of defensive customs duties,<sup>4</sup> and the U.S.A., upon federation, commenced a policy of State regulation of international trade.<sup>5</sup>

Eighteenth-century cosmopolitanism had no practical effect upon protective policy ; ideas alone were allowed to pass frontiers without let, and even these not for long after 1789. A couple of decades between 1845 and 1865, when the upper-class world was comparatively peaceful and satisfied with its standard of living and its religion, saw the making of commercial treaties which set aside hindrances to international trade. Then the struggle for markets became acute, and national jealousies developed a defensive and offensive state of mind which empowered governments to put restrictions on commerce, arrange bounties, duties, and discrimination, as full and complete as ever under the Mercantile System, and with an administrative organization which enabled them to get their rules observed in a manner quite impossible in earlier times.

Meanwhile there was a mighty fermentation in the home activities of the State, leading to a vast increase of functions between 1830 and 1870, at which date the theory of *laissez-faire* or individualism was in a very tattered condition.

2. **From 1776 to 1870.** The forces at work were (1) the economy of industrial environment, (2) the psychological influence of Manufactures, (3) the ideas and sentiments of Progress, Benthamism and Humanitarianism, and (4) democratic institutions.

<sup>1</sup> Cf. Hurst, *The Manchester Politician*.      <sup>2</sup> Morley, *Life of Cobden*, pp. 115, 589.

<sup>3</sup> Becker, *Das deutsche Manchestertum*, Karlsruhe, 1907.

<sup>4</sup> Lavissee, *Histoire*, Vol. V, Book III, Chap. I ; Levasseur, *op. cit.*, Vol. II, Book IV, Chap. II ; Ame, *Études sur les tarifs de douanes et sur les traités de commerce*, 2 Vols., Paris, 1876 ; Clapham, *The Economic Development of France and Germany*, p. 73 et seq. ; Ashley, *Modern Tariff History*, Part III.

<sup>5</sup> Ashley, *op. cit.*, Part II, Chap. I ; Bogart, *The Economic History of the United States*, New York and London, 1908, pp. 103, 104, 152.

The economy of the new industries was conditioned by the nature of steam-power. The first result of this was Congregation. It was necessary that people should be near the machines, too expensive to be installed at home. Congregation gave rise to new problems of public health administration<sup>1</sup> and poor relief and the prevention and punishment of crime.<sup>2</sup> In the matter of public health the contagious nature of disease soon abolished the notion of any absolute freedom of the individual or the locality. The possibility of the rapid movement of criminals by the use of modern transport and their opportunities to hide in the by-ways of the large towns made national regulation of training and numbers of police necessary. Furthermore, when people live in densely-packed areas social misery becomes more apparent, and to become aware is for the more conscious of the miserable the spur to reform. Secondly, the new industry and commerce required for their full extension the rapid movement of raw materials to the manufacturing centres and the rapid movement of the finished product to the consumer. Articles could be produced cheaply in proportion to the size of the market. Large-scale organization was therefore necessary. Easy movement, large capital, credit, insurance, safeguards for a proper administration of roads, and the principles of limited liability, insurance and banking were established. Thirdly, the essence of the new economy was division of labour and roundabout production. Thence, the need for Continuity, the political implications of which we have discussed in an earlier chapter.<sup>3</sup> Fourthly, a new type of subordination came into existence with the new industry. Traditional feelings of fellowship between master and servant were now overwhelmed by the ambition to inherit the new riches promised by Machines. Smiles was the great prophet of the day, and his was a gospel strangely like the dollar-standards of America at the present time. When both employers and employed were themselves ready to take advantage of each other, the first by the discipline of hours and wages and fines, the second, by the strike and sabotage, and jointly ready to take advantage of the work of infants and women under conditions of revolting cruelty, common decency obliged the State to take action, even against Manchester.

Finally, since the whirling wheels, the beating flails, the belting,

<sup>1</sup> Fourth Annual Report of Poor Law Commissioners, App. A. No. 1, 1838; Fifth Annual Report of Poor Law Commissioners, App. C. No. 2, 1839; Report of Committee on circumstances affecting the Health of the Inhabitants of Large Towns, with a view to improved sanitary regulations, 1840; Report by Edwin Chadwick, Secretary to the Poor Law Commissioners, on the Sanitary Condition of the Labouring Population of Great Britain, 1842.

<sup>2</sup> Report of Committee on the cause of the increase of the number of commitments and convictions in London and Middlesex, and the state of the Metropolis and adjoining districts, 1828; Report of Commissioners on the best means of Establishing an Efficient Police Force in the Counties of England and Wales, 1839.

<sup>3</sup> See Chap. II.

the cogs, the burning, exploding, corrosive and asphyxiating products, threatened the life of the workers, the State was prevailed upon to force the worst employers to provide safeguards and compensation. These phenomena appeared in England about two generations before they did in France, Germany, and the U.S.A., for those countries did not industrialize so rapidly, and France and the U.S.A. are still largely agricultural countries. Further in the U.S.A. the sentiment of legal safeguards of individualism was and is strong, though weakening, while France is still a country comparatively untouched by the desire for material progress.

(2) The mere existence of manufactures gave men a startling sense of power. If their economic well-being was so easily obtainable by the mere institution of machines, why not their general social well-being, their mental development? Reform of the law which had, in 1814, been said by no less an authority than Savigny, to be given to us by earlier generations and incapable of being made, was now conceived of as merely one more problem in engineering. Sir James Mackintosh somewhere speaks of the sense of wonder and emancipation of the time. Bentham, in the *Fragment on Government*,<sup>1</sup> marvels at the new possibility of reformation in the moral world, and Carlyle even more forcibly delineates the psychology of the time.<sup>2</sup> Yet this sense of power, and the desire for its exploitation, are less marked in France than in the other countries: they are most marked in the U.S.A.

(3) The effects, material and psychological, of the new system in industry, did not operate merely upon a small class and very small body of political rulers. Western Europe and the United States were now

<sup>1</sup> Bentham, *A Fragment on Government*, Part I, published in 1776: 'The age we live in is a busy age; an age in which knowledge is rapidly advancing towards perfection. In the natural world, in particular, everything teems with discovery and with improvement. The most distant and recondite regions of the earth traversed and explored—the all-vivifying and subtle element of the air so recently analysed and made known to us—are striking evidences, were all others wanting, of this pleasing truth. Correspondent to discovery and improvement in the natural world, is reformation in the moral: if that which seems a common notion be, indeed, a true one, that in the moral world there no longer remains any matter for discovery. Perhaps, however, this may not be the case: perhaps among such observations as would be best calculated to serve as grounds for reformation, are some which, being observations of matters of fact hitherto either incompletely noticed, or not at all, would, when produced, appear capable of bearing the name of discoveries; with so little method and precision have the consequences of this fundamental axiom, "It is the greatest happiness of the greatest number that is the measure of right and wrong," been as yet developed. Be this as it may, if there be room for making, and if there be use in publishing discoveries in the natural world, surely there is not much less room for making, nor much less use in proposing reformation in the moral.'

<sup>2</sup> Cf. Carlyle's *Essay*, dated 1829, in the *Edinburgh Review*. The following passage occurs in *Signs of the Times*: 'Were we required to characterize this age of ours by any single epithet we should be tempted to call it, not an Heroical, Devotional, Philosophical or Moral Age, but, above all others, the Mechanical Age. It is the age of Machinery, in every outward and inward sense of that word; the age which, with its whole undivided might forwards, teaches and practises the great art of adapting means to ends. Not the external and physical alone is now managed by machinery,

committed to democratic government, and though in Germany and France its full expression was impeded for some time by conservative and royalist forces, and in England by the upper and middle classes, government now had to reckon with the wishes of the whole population. The whole virtue of democratic government lay in its promise to shorten the circuit between the impulse of popular needs and the legal and administrative response. Nor was this all.

(a) The gospel of Progress and Perfectibility had been invented on the Continent, in France and Germany. Before the end of the eighteenth century no visions of indefinite possibilities of human progress *upon earth* had inspired men's plans. Static or cyclical patterns limited their optimism, or else perfection was, owing to the exigencies of the censorship, conceived possible only in Utopias as far away as China or at the bottom of the Atlantic Ocean. Now, however, men said that their own country could with a few simple legislative arrangements become the Kingdom of Heaven. Kant saw all the generations preparing for the Perfect Generation. Godwin explained the steps to be taken in his *Political Justice*,<sup>1</sup> and Malthus quarrelled with his father about the possibility of reaching this happy State, and, to prove the impossibility, composed the *First Essay on Population*. Though invented in France and Germany, the gospel had a speedier effect upon the U.S.A. and England than upon them, for these were not so acquisitive, were content with intellectual as much as material satisfactions, and were, moreover, for a large part, Catholic, while the other countries were Protestant, if anything. Germany, too, was handicapped by its fragmentation.

but the internal and spiritual also. Here, too, nothing follows its spontaneous course, nothing is left to be accomplished by old, natural methods. Everything has its cunningly devised implements, its pre-established apparatus: it is not done by hand, but by machinery. Thus we have machines for education: Lancastrian machines, etc. Nowhere, for example, is the deep, almost exclusive faith we have in Mechanism more visible than in the Politics of this time. Civil government does, by its nature, include much that is mechanical, and must be treated accordingly. We term it, indeed, in ordinary language, the machine of Society, and talk of it as the grand working wheel from which all private machines must derive, or to which they must adapt their movements. Considered merely as a metaphor, all this is well enough. Thus it is by the mere condition of the machine; by preserving it untouched, or else by reconstructing it, and oiling it anew, that man's salvation as a social being is to be insured and indefinitely promoted. . . . Cf. Hazlitt, *Spirit of the Age*; Kant, *The Critique of Pure Reason*, Preface (see *The Philosophy of Kant*, Selected and Translated by J. Watson, New Edition, Glasgow, 1897), p. 1: 'This may well be called the age of criticism, a criticism from which nothing need hope to escape. When religion seeks to shelter itself behind its sanctity, and law behind its majesty, they justly awaken suspicion against themselves, and lose all claim to that which has been able to bear the test of its free and open scrutiny.'

<sup>1</sup> Godwin, *Enquiry Concerning Political Justice*, 2nd Edition, London, 1796, Vol. II; see also Brailsford, *Shelley, Godwin and their Circle*; Halévy, *La formation du radicalisme philosophique*, Part II, *L'évolution de la doctrine Utilitaire*, Paris, 1901 (translation by M. Morris, *The Growth of Philosophic Radicalism*); Brown, *The French Revolution in English History*, London, 1923. Observe the same current in the Chartist movement, especially in *The Life and Struggles of William Lovett*, London, 1876, Chap. VI, p. 124, et seq.

(b) Bentham, searching for a principle of political utility which should be unflavoured by the 'nonsense on stilts' of Natural Rights and the Natural Order, seized on the 'greatest happiness of the greatest number'.<sup>1</sup> This was later incorporated into the Radical faith and programme in all countries, and became one of those powerful ultimate dogmas which lead society very far. The dogma could, of course, have had its application in a slackening of State activity, but in fact the effect was the opposite, because society required it.

(c) The eighteenth century had seen an extraordinary revival of humanitarian feeling and benevolence.<sup>2</sup> Prisons, hospital and health reform occupied the minds of many people in England two or three decades before the Reform Bill of 1832, and many things were accomplished.

These forces played upon the enfranchised classes, who, in turn, caused Parliament to undertake certain activities. The vote was to State activity what steam power was to industry: it drove the State fast and far. After 1834 Parliamentary debates, and therefore the motives of the members, became freely reported. From 1836 division lists were published by Order of the House. In 1835 the first printed Questions were put on the Order Paper, and year by year there was a steady increase in the number of questions asked by the government.<sup>3</sup> The Chartist Movement demanded, not only the vote and proper parliamentary representation: men like William Lovett said: 'But it is not for the mere possession of the franchise that is to benefit our country; that is only the means to a just end—the election of the best and wisest of men to solve a question which has never yet been propounded in any legislative body—namely, *how shall all the resources of our country be made to advance the intellectual and social happiness of every individual? It is not merely the removing of evils, but the establishing of remedies that can benefit the millions.* . . .'<sup>4</sup> The spinners of Silesia and Lyons, and their like, were already preparing the way for radical and socialist parties in Prussia and France. In 1867 John Stuart Mill uttered his gloomy fear that the working class in a majority would certainly infringe property rights.<sup>5</sup>

What was the meaning of the growth of State activity? The immediate driving spirit was the unwillingness of those who achieved

<sup>1</sup> See *Principles of Morals and Legislation*; E. Hakévy, op. cit.; Stephen, *The English Utilitarians*, London, 1900; cf. also Dicey, *Law and Public Opinion in England*, 2nd Edition, London, 1919.

<sup>2</sup> Cf. for the most elaborate treatment, W. J. Warner, *The Wesleyan Movement in the Industrial Revolution: A Study in the Sociology of Religion*; cf. also Kirkman Gray, *Philanthropy and the State*, London, 1908.

<sup>3</sup> In 1850 there were only a little over 212 questions asked in the whole Session; in 1870 there were 1,200; and in 1900 there were 5,000.

<sup>4</sup> Lovett, op. cit., pp. 257, 258.

<sup>5</sup> J. S. Mill, *Considerations on Representative Government*, Chap. VI.

political supremacy to allow the spontaneous behaviour of people to have its ungoverned consequences. They believed the social conscience, in the terms of the best light they had, to be better than the unregulated sum of individual consciences. The unfettered possibilities of the average man had caused scandalous happenings, and immediate sufferers, and sympathetic and imaginative observers, desired to reduce the evils by a force superior to that which oppressed them. Political institutions were created to heal the physical, mental and æsthetic sufferings of some social groups at the expense of others. Farmers were sacrificed for manufacturers because these seemed, in the prevailing and predicted conditions of industry, commerce and international markets, to offer the majority of people an ultimately greater benefit than agriculture.<sup>1</sup> The manufacturers' potential profits were reduced in order that inhuman, and ultimately wasteful, conditions of labour should be modified. The manufacturers would not see beyond the margin of their pass-books, and could, or would, not see that beyond a certain point their prosperity was obtained by the direct sacrifice of lives. The consequences of such limited vision are the negation of the Commonwealth: for if its principle is Order, that may be disturbed by enraged workers; if Freedom, such a system contradicts it; if Virtue, then both slave-master and slave are on the principles of a Commonwealth condemned; and in no State is it publicly confessed that its basis is deliberate cruelty and servility. When both employers and parents were compelled to give up their freedom to employ infants, the reasons and motives were of a kind which these classes themselves did not (if they could) sufficiently apprehend and desire, the State could not, in the long run, like them, confuse sheer social insensitiveness with economic needs, and only from the State's standpoint as an enduring association, transcending the lifetime of even the longest-lived man, could a proper regard be had that the next generation should not be stunted and withered in body and mind for the sake of the standard of living of the present.<sup>2</sup>

Human behaviour was thus bent to conform with ends which individuals acting unchecked might not have pursued. The total mental, biological and natural resources of society were operated upon by Governments; here warped, stunted, docked, there fostered to accord with a pattern. The alleged justification of that pattern was the age-long one of State activity: that the State had a superior knowledge of fact to the individual; that the State had an ethically better will than the individual; that the State had an interest transcending generations; and that the State had an organization on a

<sup>1</sup> *Free Trade and other Fundamental Doctrines of the Manchester School*, edited, with an introduction, by F. W. Hirst, London and New York, 1903.

<sup>2</sup> Cf. Chap. IV *infra*.

sufficiently large scale to cope economically with the required function.<sup>1</sup>

**From the Crisis in the Seventies and Eighties, until the Present.** State activity increased with the need for it, although the prevailing dogma was *laissez-faire* and self-help, and in spite of the economic theorists whose fatalistic individualism found its comprehensive expression in Mill's *Political Economy*<sup>2</sup> and *Essay on Liberty*.<sup>3</sup> But Mill himself was gravely worried by new longings; he could be neither entirely pessimistic nor so individualistic as his predecessors who had lived in the gloomy thirty years which began the nineteenth century.

Indeed, the full consequences of the industrial change were becoming visible and compelled the invention of institutions to cope with them. These, with the development of new doctrines and sentiments, caused the presumption in favour of *laissez-faire* to be changed into a presumption in favour of State interference. That change came about by imperceptible but important stages in the seventies and the eighties of the nineteenth century.

In the first place, the question had to be answered whether the State, as an arrangement producing a stable social order, was to be

<sup>1</sup> In France, Germany and the United States the same essential motive forces were at work, but their speed and magnitude differed owing to the obstacles which had to be met in historical institutions, like particularism in Germany, or the contests with Royalism in France, or where other duties like the mastery of extensive uninhabited areas was first necessary, as in the United States. Further, there were political traditions which had to be overcome, especially in countries like France and the United States, where the dogma of liberty had attained rather unyielding forms owing to the historical circumstances of its creation. Moreover, the nature of industry slightly differed in the different countries, and the modern industrial system began at different times and developed with different speed. All these things naturally had their effects in circulating or retarding the developments of which we have spoken. They can be followed for the different countries in the works given below (for general reference only): (1) *France*—Lavissee, *Histoire de la France Contemporaine*, Vol. V, Book III, Vol. VI, Book VI, Chaps. I–III, Vol. VIII, Book IV, Chaps. I–V; Levasseur, *Histoire des Classes Ouvrières et de l'Industrie en France*, 1789–1870; Pic, *Traité élémentaire de législation industrielle*, 4th Edition, Paris, 1912; Clapham, *The Economic Development of France and Germany, 1815–1914*, 3rd Edition, Cambridge, 1928; Michel, *L'Idée de l'État*, 3rd Edition, Paris, 1898; Jourdain, *Le Rôle économique de l'État*. (2) *Germany*—Sombart, *Die deutsche Volkswirtschaft im neunzehnten Jahrhundert*, 6th Edition, Berlin, 1923; K. Lamprecht, *Zur jüngsten deutschen Vergangenheit*, 2 Vols., Freiburg, 1903; W. Troeltsch, *Über die neuesten Veränderungen in deutschen Wirtschaftsleben*, Stuttgart, 1899; Mehring, *Geschichte der deutschen Sozialdemokratie*, 4th Edition, Stuttgart, 1909; Mombert, *Soziale und Wirtschaftspolitische Anschauungen in Deutschland*, Leipzig, 1919; W. H. Dawson, *The Evolution of Modern Germany*, 2nd Edition, London, 1919. (3) *United States*—H. M. Schlesinger, *Political and Social History of the United States 1829–1925*, New York, 1925; E. L. Bogart, *The Economic History of the United States* (Longmans), 1908; C. A. Beard, *Contemporary American History*; C. A. and M. R. Beard, *The Rise of American Civilization*, 2 Vols., New York, 1928; W. Thompson, *Federal Centralization*, New York, 1923; A. F. Macdonald, *Federal Aid*, New York, 1928; R. G. Tugwell (Editor), *The Trend of Economics*, New York, 1924; but there is a vast literature which covers each branch of State activity.

<sup>2</sup> Published in 1848.

<sup>3</sup> Published in 1859.



allowed to founder from the shock of social forces making for disruption or whether these were to be so adjusted as to allow further smooth continuance of life? All the economic interests were tugging against each other. People were becoming increasingly conscious of the cost of the new prosperity in terms of the misery of the working classes—England, again, necessarily the first.

**The Social Microscope.** An apparatus of exploration was invented for the social field, as mightily influential in its sphere, as the invention of the microscope had been in that of physics and medicine: Royal Commissions of Inquiry, beginning with that of 1832 on the administration of towns, were every five years or so making clear the relationship between detestable social phenomena and their exact quantitative causes. What else can so assault the conscience as exact knowledge? Who can for long resist the demonstrated fact that an evil is remediable by human intervention?

Thus conditions pressed, and knowledge of their effects and causes was extended. The conditions of Housing, Health, Factories and Mines were remodelled by the State. The sectional interests which had been created by the new industry, like the Railway interest and the Trade Unions, were incorporated into the State by measures which took away from the former the power to extract to the full from other occupations what the traffic would bear,<sup>1</sup> and arranged for the latter the possibility of legal withdrawal of their work with the minimum danger of penalties.<sup>2</sup> All these things were not accomplished without much turmoil and stress: strikes, riots, and political battles in parliaments and the secret avenues that lead to it. Nothing was accomplished immediately knowledge was gained and conscience informed; threats and fears of violence and disorder were required to ram home the logic of social justice.<sup>3</sup>

The condition of the State's continued existence is that it should every day renew itself, nourishing Government with fresh powers, and expelling the remnants of that which no longer lives with wholesome vigour. Among such powers are the mind and the spirit as well as

<sup>1</sup> *England*—1872, Report of Joint Committee; 1873, Railway and Canal Commission; 1888, Railway and Canal Traffic Act. *France*—Law of 1842 marked the commencement of control. *Germany*—Control inaugurated by the Constitution, 1871. *United States*—1887, Interstate Commerce Act.

<sup>2</sup> Notably by: 1871 Trade Union Act; 1875 Conspiracy and Protection of Property Act (in England); the Legislation of 1864, 1881 and 1884 in France; 1881 in Germany (compulsory formation of Unions); in the United States the position has been determined by Court interpretations of 'conspiracy'. See Commons and Andrews, *Principles of Labour Legislation*, London and New York, 1920: Chap. III on the effects of the Anti-trust laws.

<sup>3</sup> Morley, *The Life of Cobden*, Chaps. VI–XV on the Anti-Corn Law League; Jephson, *The Platform: Its Rise and Progress*, London, 1892. Cf. for example the turbulent career of Ferdinand Lassalle in Germany (Oncken's *Lassalle*, or Bernstein's *Lassalle* are very good studies). Cf. also Mehring, *Geschichte der Sozialdemokratie*. Cf. the effect of the Socialist opposition and the Socialist plans on Bismark's policy.

Economic Welfare. These were peculiarly energetic and transformative in the two decades of change. Religion had long been allied with fatalism as to this world's goods, but now it became socially active. In England, Nonconformity was allied with Liberal politics.<sup>1</sup> The Church of England gave birth, through Maurice and Kingsley, to Christian Socialism,<sup>2</sup> and the spirit of *Two Years Ago* and *Alton Locke* spread, though not far, and influenced the Church to take an active interest in social and industrial problems. In Germany a Christian Democratic party was formed.<sup>3</sup> The Pope, in a famous encyclical, recalled Catholics to a sense of Christian social service. The fatalism of religion was challenged by the social good offered by science,<sup>4</sup> and against ensconced and complacent individualism another ideal was preached: an actually living community under Christ, in which no man has a right to call anything that he has his own absolutely, but in which there is spiritual fellowship and practical co-operation.

Perhaps the principal quality of the new social knowledge was to draw attention to the non-existence of any absolute individualism of conduct, and to discover responsibility for many apparently individual defects in causes external to the individual. That is, the theory of individual interest acting isolatedly and doing nothing but good, was refuted by these detailed investigations, and the idea that it was possible to consider men as the isolated results of their own isolated beings was confuted in every paragraph of every Report; confuted, not by a social theory, but by the recorded observation of men's actual behaviour.

This is best to be seen in the realm of Health and Poor Law Administration. In the first, even the earliest theories of disease had connected bad smells produced by putrefying organic matter with epidemics, and crude notions of contagion had dictated the activity of local authorities. But now, towards the end of the nineteenth century the microscope<sup>5</sup> had been so perfected that a universe of living things, called bacteria,

<sup>1</sup> West, *A History of the Chartist Movement*, London, 1920; Hovell, *The Chartist Movement*, London, 1918; Smith, *The Reform Movement in Birmingham, 1830-1848*, Ph.D. Thesis (unpublished), University of London Library.

<sup>2</sup> Raven, *Christian Socialism, 1848-1854*; Kingsley, *Letters and Memories of his Life by his Wife*, 2 Vols., 1877; *Life of F. D. Maurice*, chiefly told in his own letters, edited by his son F. Maurice, 1884; C. W. Stubbs, *Kingsley*, London, 1900; Beer, *A History of British Socialism*, 2 Vols., London, 1919, Vol. II, Part III, Chap. IX, 3.

<sup>3</sup> Cf. Chapter on Parties, *infra*.

<sup>4</sup> For instance, in Public Health and Sanitary Reform. Kingsley, for example, devoted himself to lectures on sanitation, and his sermons appear increasingly to have concerned themselves with the hygienic conditions of salvation (*On Certain Obstacles to Sanitary Reform*, in Transactions of the National Association for the Promotion of Social Science, 1858). Perhaps readers of Kingsley's novels may remember the substratum of the novel *Two Years Ago*, which was concerned with the cholera epidemic of 1848 and where the themes, religion and sanitation, were personified respectively in the heroine, Grace Harvey, and the hero, Thomas Thurnall. It was a sign of the times, and a happy one, that the two ultimately married.

<sup>5</sup> See W. A. Looney, *The Growth of Biology*, 1925.

could be studied, and it was now proven that they generated disease.<sup>1</sup> It was proved that every person was a potential plague. Mere prudence, if not fear, caused the State to be given a power of regulation. Since the germ was everywhere the Government must be everywhere : as the microbe lodged with the individual, and could issue forth in the form of quick and nasty death, the Government must control and administer the microbe's living lodging. (This type of argument is less effective and much more recent in France than elsewhere in spite of the pioneer work of Pasteur.) Under such an examination, what could be left of individual freedom ?<sup>2</sup> A host of measures were taken in an increasing degree of compulsion : examination of suspects, notification<sup>3</sup> of disease, isolation of the diseased, compulsory treatment, the examination of 'contacts'. But it was soon found out that disease could be overcome not only by killing bacteria, but by making the individual strong enough to resist them ; and the means thereto could be, in the case of those too poor to help themselves, State feeding, State housing, State town planning, the reduction of hours, the provision of welfare accommodation in work places. In the majority of cases, nourishment, sunlight, rest, and cleanliness could be obtained only by State provision.<sup>4</sup>

Bacteriology has, more than most things in the nineteenth century, made all men one.

In Poor Law Administration, the Reformers of 1835 sought, as statesmen so often seek, automatic and infallible tests, which even foolish officials could use without the consequences of folly. The Workhouse Test was the result, based on the simple principle that all the able-bodied destitute have some individual defect which produces destitution. The infantile simplicity of this psychology was soon revealed, and the history of English Poor Law Administration after 1835 was nothing but a series of retreats from the Test in proportion as men began to see that society was itself largely the cause of the individual's destitution. Even the arch-apostle of the Test, Edwin Chadwick, was compelled to admit that over half the destitution was caused by ill-health directly resultant upon the insanitary conditions of the slums !<sup>5</sup> As sociological investigation proceeded, the responsibility

<sup>1</sup> Dobell, *Parasitology*, Vol. XV, Cambridge, 1923. See also Muir and Ritchie, *Manual of Bacteriology*, Edinburgh, 1919 ; Mackie and McCartney, *An Introduction to Practical Bacteriology*, Edinburgh, 1925 ; C. H. Browning, *Bacteriology*, London.

<sup>2</sup> Huxley, *Methods and Results*, 'Administrative Nihilism', Address, October, 1871.

<sup>3</sup> First by the Infectious Diseases Notification Act, 1889, which was adoptive, and later, in 1899, by the compulsory powers under the Notification of Infectious Diseases Extension Act.

<sup>4</sup> Newsholme, *Health Problems in Organized Society ; Studies in the Social Aspects of Public Health*, London, 1927 ; Newman, *An Outline of the Practice of Preventive Medicine*—memorandum to the Ministry of Health, London, 1926 ; Newman, *Public Education in Health*, memorandum to the Ministry of Health, London, 1926.

<sup>5</sup> ' . . . At the present time fever prevails to an unusually alarming extent in the Metropolis, and the pressure of the claims for relief in the rural Unions, on the

of entirely unexpected factors was revealed : <sup>1</sup> no education—no skill,—destitution ; bad nourishment—bad health,—destitution ; accidents at work—no compensation,—destitution ; strikes or slumps in trade at home or abroad—no insurance scheme, and no publicly arranged relief work,—destitution ; old age—no provision,—destitution ; illness—no savings,—destitution ; where, indeed, did the individual end and the State begin ?

**Arithmetic becomes Argumentative.** The day of absolute principles in legislative discussion had passed more surely than the day of absolute government. For Statistics—the mathematical recording and analysis of social phenomena—had taken its place as a servant of government, and commodities, qualities, behaviour and the operations of Nature were now being investigated with an arithmetic caution hitherto unapplied.<sup>2</sup> The work of Farr and Newmarch in England produced a revolution in the social thought of those who had the power to decide what and how much the State should undertake, and the real power in government, because of this revolution, flowed steadily from the parliamentarians to the professional Civil Servants. Where, in earlier decades, men had been wont to talk in terms of absolutes, while recognizing that no absolute would suffice in actual politics, a means of measurement now made it easy for men to retreat from their own absolute—*laissez-faire*, for example, and yet not fly to the opposite extreme. In France in the 'thirties and 'forties the whole battle for free trade was waged around the system of customs statistics in use,<sup>3</sup> while Prussia had already for many decades converted the science of statistics into an art of government.<sup>4</sup> The effect of the statistical or quantitative habit of mind is observable in Jevon's treatment of his problem in the *State in Relation to Labour*.<sup>5</sup> It is marked by great caution, and a sensitive regard for cause and effect. Now this habit of mind does not necessarily lead to greater State activity : it may work either way ; which way it works, depends upon the needs of the

ground of destitution caused by sickness, have recently been extremely severe ; but in the course of the investigations into the causes of destitution and the condition of the pauperized classes, carried on under the operation of the new law, and especially in the course of the investigations of the claims for relief arising from the prevalent sickness, extensive and constantly-acting physical causes of sickness and destitution have been disclosed and rendered fearfully manifest. . . . ' (Letter of the Poor Law Commissioners to the Home Secretary, Lord John Russell, 1838. Cited Sir J. Simon : *English Sanitary Institutions*, pp. 180, 181.)

<sup>1</sup> Reports of the Royal Commission on the Poor Law, 1909, Cd. 4499 ; Ireland, Cd. 4630 ; Scotland, Cd. 4922.

<sup>2</sup> Cf. Simon, op. cit., 259–68 ; Koren, *The History of Statistics : Their Development and Progress in Many Countries*, New York, 1918.

<sup>3</sup> Lavissee, *Histoire de France Contemporaine*, 1921, Vol. IV, Book III, Chap. I. Neckar (*De l'Administration des Finances*), a century before anybody in France was likely to listen to him had urged, with his banker's experience, the establishment of a bureau of statistics.

<sup>4</sup> See Marchet, op. cit., Cameralist studies included statistical recording.

<sup>5</sup> Published in 1882.

time. In the 'seventies and 'eighties the statistical habit of mind finally inclined, on the balance, to overcome eternal and absolute negations of State activity, because that habit inculcated the view that in society we are concerned only with the more or less, while the substance of statistics, showed, as we have said already, the number of points at which social life needed social control to avoid evils and produce good.<sup>1</sup>

**The Social Conscience.** All this does not entirely account for the growth in State activity and the substantial reign of collectivism. We must add to other factors the growth of a social conscience. Its sources are the effects of an ugly and miserable environment upon certain geniuses of perception and sensitiveness: such as Shaftesbury, Dickens, Carlyle, Ruskin, Morris, Florence Nightingale, Henry George, Disraeli, Toynbee, Morley, Chamberlain, T. H. Green, the Webbs, Wells, Bernard Shaw, Lassalle, Rodbertus, Bebel, Naumann, and the members of the 'Sozial Verein', Saint Simon, Proudhon, Fourier. Their works are instinct with indignation at the wanton disorders of human society, and brimful of compassion. An authority upon that time describes the upper layer of society as having been overcome with

<sup>1</sup> I discovered, after I had written this, that Newmarch himself had recognized the process that was going on. In a lecture before the Royal Statistical Society in September, 1861, he describes the economic changes and ascribes a great deal of the impulsive force to the method of statistical examination. *Journal of the Statistical Society*, XXIV, 452: 'We have learned that in all questions relating to human society,—in all controversies where the agency of human beings has to be relied upon for working out even the smallest results—we have learned that in these inquiries the only sound basis on which we can found doctrines, and still more the only safe basis on which we can erect laws, is not by hypothetical deduction, however ingenious and subtle, but conclusions and reasoning supported by the largest and most careful investigation of facts. This vital change of method, this substitution of observation and experiment (and for our present purpose the two words mean very much the same thing) for deduction arrived at by geometrical reasoning, seems to me to be the most prominent fact of the last thirty or forty years, as regards the progress of the branches of knowledge which more immediately interest us in this Section. We are surrounded by evidence of the occurrence of changes closely analogous in almost every other division of human inquiry. A strong desire for evidence ample and accurate, an ardent craving after the results of the most patient investigation of large actual experience, and increasing distrust of doctrines and conclusions which do not rest upon such experience, all habits and tendencies of mind which have become prevalent not only among those who cultivate economic science, but among the cultivators of knowledge of nearly all kinds. We find this experimental and scrupulous spirit vigorously manifest in the pursuits of the Historian—in Archaeology . . . Literature. . . . We find it also, happily, in Politics, and there at least where the only lawful object is wise legislation, a regard for actual experience rather than a proneness to loose speculation must be almost an unmixed good. It appears to me, therefore, looking at the changes of the last thirty or forty years, that we are fully justified in accepting as one of the most conspicuous and fortunate of the results arising out of those changes, the introduction into the large class of inquiries which relate to the constitution and control of human societies, of an observing, cautious, and experimental spirit—a spirit which leads men to accept no doctrine and place reliance on no conclusions which come to them supported only by hypothetical reasoning, however subtle and ingenious; but, on the contrary, strongly disposes them to consider the teachings of experience, if not as the exclusive, certainly as the chief

'a class-consciousness of sin.'<sup>1</sup> Nor could Liberalism avoid the effects of the energy released by the sense of social injustice.<sup>2</sup> It was this development which caused Herbert Spencer to label Liberalism the New Toryism, and to compose his famous essays: *The Man versus the State*.

Soon this power began to be released in organized forms. After 1867, as a result of vastly different causes in different countries, almost universal suffrage was established and statesmen had to reckon with the natural desire of men to be saved from their miseries.<sup>3</sup> What one

foundation for leading opinions and practical measures.' And p. 463: 'The controversy, as you know, extended over many years and gradually it was proved by experiment and observation that when capital, as in the case of manufactures, depends for profitable results upon the employment of large masses of workpeople, a great proportion of whom must be women and children, it is the direct and plain pecuniary interest of the owner of the capital to take especial care of the physical energy and condition of his workpeople.' And p. 465: 'It is probably as regards . . . interference by the State that the most remains to be done, and difficulties of the gravest kind remain to be surmounted. We seem to be gradually arriving at the conclusion—and a conclusion founded on no slight evidence—that as society advances, especially in an old country, as social relations become more complex—there grows up a class of difficulties which cannot be dealt with satisfactorily by individual exertion and therefore a class of difficulties which must be dealt with by the State. While on the one hand we are bound to maintain a salutary dread and a constant suspicion of the interference of the State beyond the narrowest limits, so on the other hand we cannot disguise from ourselves that there are a large class of cases in which individual agency wholly fails to protect the plainest individual rights.'

<sup>1</sup> B. Webb, *My Apprenticeship*, Chap. IV. Disraeli's description of the Two Nations which dwelt in England came home to the imagination of this generation: 'There is so much to lament in the world in which we live that I can spare no pang for the past. . . . Society, still in its infancy, is beginning to feel its way.' In a famous address on State Education, Huxley, the biologist, uttered a phrase which well represents the thought of those who observed the life of that second and unfortunate nation: 'Misery is a match that never goes out \*; genius, as an explosive power, beats gunpowder hollow: and if knowledge, which should give that power guidance, is wanting, the chances are not small that the rocket will simply run amuck among friends and foes.' Disraeli committed his party to reduce the differences between the Two Nations in his great speech at the Crystal Palace in 1872.†

<sup>2</sup> Goschen said in 1877: 'It might be an unpopular thing to say it, but Political Economy had been dethroned in that House and Philanthropy had been allowed to take its place' (cf. also Cook, *Life of Florence Nightingale* (1925), p. 295). Gladstone in a letter to Lord Acton deplored the change which was coming over the party: 'The liberalism of to-day is better in what I have described as ennobling the old Conservatism ("the pacific, law-respecting, economic elements"): nay much better, yet far from being good. Its pet idea is what they call construction, that is to say taking into the hands of the State the business of the individual man. Both the one and the other have much to estrange me and have had for many years.'

<sup>3</sup> Seymour, *Electoral Reform in England and Wales*, New Haven, 1915.

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\* *Methods and Results*: 'Administrative Nihilism', Address, October 1871.

† . . . He laid it down that the Tory party had three great objects: to maintain our institutions, to uphold the Empire, and to elevate the condition of the people. Of the last he said: 'It involves the state of the dwellings of the people, the moral consequences of which are not less considerable than the physical. It involves their enjoyment of some of the chief elements of nature—air, light and water. It involves the regulation of their industry, the inspection of their toil. It involves the purity of their provisions, and it touches upon all the means by which you may wean them from habits of excess and of brutality.'

Mill, Spencer and others, projected into, and dominating, the whole of their discussion.

2. The antithesis between State and Individual was founded upon this false view of the 'individual', and upon the fallacy that the State was a sovereign authority the power of which emanated not from the constituent individuals, but from some undiscoverable but nevertheless reprehensible source.

3. There is not necessarily any connexion between State activity and centralization; the idea that these were synonymous, so frequently introduced into controversy, was erroneous, for the possible forms of organization for State activity were many, including municipal and vocational administration.<sup>1</sup>

4. Attacks upon the incapacity of legislators and administrators of the kind made by Spencer (more crotchety and ignorantly stubborn in this regard than Mill) were not entirely valid arguments against State activity. It is true that the efficacy of State activity depends upon the efficiency of the instruments, and that efficacy is one element in the decision to act or not to act: but it is an argument relative to a particular set of circumstances and not an absolute argument against activity. Nevertheless, Spencer had put his finger upon an important aspect of the question. The efficiency of the instrument is indeed of critical importance. Spencer's criticism of the competence of legislators, however, invited comparison between them and the private business men, and Lord Pembroke in a pamphlet on Liberty and Socialism published by the now long defunct 'Liberty and Property Defence League'<sup>2</sup> made the comparison: 'What', he says, 'would private enterprise look like if its mistakes and failures were collected and pilloried in a similar manner?'

5. The abstract notion of Liberty itself was questioned, and it was asked, is this more than one of *many* ends of which man seeks the realization? Some liberty is desirable, as well as other things, but nothing at all is attainable without a limitation of liberty. If, then, limitation is conceded, the extent of the limitation is merely a question of the more or less dependent upon the mixture of men's desires and capacities, and this varies in time and place.

6. Stephen enunciated the questions to be asked before activity is undertaken by the State,<sup>3</sup> and these were<sup>4</sup>: (a) is the object aimed at good? (i.e. will it tend to advance the well-being of the community?);

<sup>1</sup> But the thought is to be seen constantly recurring in Parliament between 1848 and the end of the nineteenth century.

<sup>2</sup> Cited, D. G. Ritchie, op. cit., p. 56 footnote.

<sup>3</sup> Stephen, op. cit., p. 49. Stephen's tests were these: 'Compulsion is bad, (i) when the object aimed at is bad; (ii) when the object aimed at is good but the compulsion employed is not calculated to obtain it; (iii) when the object aimed at is good, and the compulsion employed is calculated to obtain it, but at too great an expense.'

<sup>4</sup> D. G. Ritchie, op. cit., p. 109.

(b) will the proposed means attain it ? (c) will they attain it at too great expense or not ? (i.e. can the end be attained without doing more harm than is compensated by the benefit of its attainment ?).

7. It was further proved that the least amount of State activity possible was education : for, if the masses, uneducated, were to become the legislators, all the evils prophesied by Spencer must result. But was it necessary to wait until all had been formally educated to a required standard ; was not a State activity already a part of civic education, a means to reform character ?

What was the net result of the development of State activity between the middle and the last quarter of the nineteenth century ? The cardinal gain was the break-up of absolutes, or at least I ought to say, the break-up of *old* absolutes ; for Socialism, the new dispensation, was in its early days an absolute, as unmeasured as those it replaced. Further, towards the end of the century, government was actually conducting an enormous range of activities, and the immediate promise of all political parties was for more. The direction of opinion was well-established : the State could effectively act, for experience had shown that it could provide the organization and the officials ; the State ought to act, Humanity, Fraternity, Equality, and the prudent prevention of social friction and waste demanded it. From this time dates the rapid development of Socialist schools of thought, and of Socialist and Labour Parties, in practical politics. The Western World has become more and more socialistic in deed and thought. The essence of that thought is, first, that the life of the individual person shall be made to respond to a social standard established by the State, and next, that the State shall provide for the poor a minimum of services and security, at the ultimate expense of the wealthy. The last thirty years have been devoted to inquiry into the means of realizing this ideal, and to re-shaping the ideal, first, according to the revealed technical difficulties, and second, to meeting the obstacles of interest and opinion by assault or compromise. But this is already a part of the Chapters on Political Parties, which come later ; and before we arrive at them we have several stages to cover, the next being an analytical study of State Activity, for this gives an even closer insight into the subject than the broad historical survey we have already undertaken.



## CHAPTER IV

### STATE ACTIVITY : ANALYTICAL

**W**E have now to take certain examples of State activity in different countries, and consider the conditions of their success or failure.

**The State and the Machine.** We can begin by likening the State (in regard to its activity) to a machine.<sup>1</sup> Machines are contrivances which simply convert energy. Their use is to overcome the limitations of individual or collective power. In regard to physical force, the machine converts the crude strength into a smaller amount over a longer distance, into a smaller amount moving more rapidly, or enables the attainment of more weight by the loss of distance and rapidity, and so on. There are many possible combinations of the elements, strength, duration, and speed. The combination is sought according to human convenience : the steam-engine is made to exert a large force through a small distance at great rapidity, and, in a spinning wheel, the bobbin runs at a more rapid pace than any human arm could turn it, but with a small force ; and levers and pulleys are also common examples of this process of conversion.

Government is a machine in this sense, that it is a converter of energy. Its ultimate force is composed of the psychological and physical qualities of the people, and their resources. There are phases in the life of society where local and national government is required to convert this force from what it is at any point of time into something more desirable. But in the case of government the possibilities of conversion are immense, because human qualities are so many and diverse, and the processes are necessarily complex. For example, it converts some people's work and earnings, through taxation, into the education of other people's children, or a Pyrenean peasant's tax on tobacco into Grand Opera in Paris, or sectional beliefs that alcoholic liquors are harmful and demoralizing, into the abolition of saloons, distilleries, and liquor imports, or the institution of 'one-way traffic' converts a greater expenditure of petrol into travelling speed and safety.

<sup>1</sup> I am well aware of the dangers of this analogy : sociology has sufficiently pointed out that society is an organism, that the parts in society give life and movement, whereas in a machine the energy and direction come from external sources, etc., etc. The State, however, conceived as institutions of government, approximates more to a machine than to a society—at any rate the analogy is only a useful instrument.

**No intrinsic advantage.** The State has no intrinsic advantage over any other social contrivance which is engaged in transforming its member's sentiments, energy, and resources, into more desirable products. It must necessarily submit to the laws of human nature and environment. *No work is gained by using a machine.* The product never contains more of the original material than was put in, though it may be more desirable. Indeed, work is lost in the process of transformation, for there is no perfect machine, that is, one in which human contacts are perfectly frictionless, without wasteful impediments to the process ; and many of the problems of government arise from this unnecessary 'loss' of work—administration, for example, absorbs and perverts much energy and resources. Finally, 'what is gained in force is lost in distance'—what is gained in one direction by the transformation is lost elsewhere because the transformation has taken place.

**Social Energy and its Conversion.** If we bear in mind that the State is an instrument of conversion we can the better separate out the factors in the process and then learn the conditions upon which their presence or absence depends. These elements are :

I. *The Initial Energy.* By this we mean the instincts, the sentiments and the intellectual beliefs, that certain courses of action or inaction are desirable or undesirable, the mental and spiritual constitution which causes a movement of creation or destruction : as, for example, the desire to impose religious conformity, or to put down Trusts, or to prohibit alcoholic liquors, or to establish workers' control in industry. Here one must observe the extent to which these things are inborn, and the extent to which they are the product of teaching. Further, their dependence upon the nature of the environment is important, for human plans are made by reference to such circumstances, and when these disappear the plans and habits of mind disappear.

II. *Material Resources.* However insistent the demands of the mind and the spirit, there must be present a sufficiency of material resources, because human energy by itself is often insufficient, however stimulated and encouraged, to accomplish what is desired. Religious conformity has required prisons and instruments of torture, shackles and faggots, censers, altars, flowers and musical instruments ; to educate requires books, pens, desks ; to preserve authority government needs cannons, gunpowder, aeroplanes and microphones, medals, certificates of honour, robes of office, and official buildings. It has hitherto been found impossible to keep officials or party agents alive simply by the word of God, or, if we may descend from the sublime, by the word of a Lincoln, a Gladstone, or a Poincaré.

III. *An Administrative Machine* is necessary to apply the Initial Energy and the Resources to their particular ends. This machine

consists of the organization and the men especially engaged in formulating in detail the vague general wishes of the population, in converting the detailed formulae thus established into regulations, and in applying these to affect human behaviour. It must be (1) capable of understanding the general purpose, and zealous to realize it; (2) competent to know when, and where, and how much, its activity is required, and zealous in application; (3) honest; (4) sufficiently numerous.

These three factors are observable in all forms of State activity, and upon their quality and combination depends the success of the undertaking. At the margin, where these factors cannot be produced, State activity fails. We shall in the analysis which follows explore the conditions which mould these factors in their special form.

The conditions of State activity may thus be stated.

## I

The State is not necessarily or intrinsically abler for all things than other human groups or institutions. The scope of its powers and its effectiveness depend upon its real qualities, and only in so far as these happen in any particular case to be more appropriate to the activity than those possessed by other associations is it more competent than they. Competition, for example, is close in such activities as telephones, telegraphs, railways, and mining. As a rule, however, the State has certain qualities which bring it great power. These are Age, and the Vastness of Ordered Territory and Institutions. Age produces awe and veneration, and these, in turn, create a submissive, reverent and obedient attitude; they stir inexplicable sentiments in the individual heart, and people are loath to destroy an ancient fabric, even though a new one is more useful and better satisfies the reason of their own day. In order that the ancestral temples, the quaint usages of their forefathers, and congenial memories and ceremonial, may live on, they are reconciled to commands uttered in their name. This thought is expressed in the tone of Burke's *Reflections on the French Revolution*. Burke feels himself part of a past he is unwilling to destroy. The German Romantics, Fichte, the Schegels, Novalis and Adam Müller, the historical jurist Savigny,<sup>1</sup> and the French Joseph De Maistre founded their theories of the State in part upon its age; and so, too, modern conservative parties, especially those which call themselves 'national'. When men say 'the wisdom of our ancestors' the psychological emphasis is rather upon ancestors and ancestry than upon wisdom.<sup>2</sup> Men will make sacrifices of energy and time for the modern State for the sake of its many generations, so, especially in time of war; so, too, in combating sedition or constitutional reform.

<sup>1</sup> F. C. v. Savigny, *Von Beruf unser Zeit für Gesetzgebung*, 1814.

<sup>2</sup> Cf. Bentham, *The Book of Fallacies*, Chap. II (*Works*, II, Edinburgh, 1843).

The interest of a generation does not cease with its regard for the past or its own immediate comfort. The State is generally a continuing association: it has Futurity; it is, as an association, immortal. It is possible to appeal to men to work, and to appeal successfully, in the name of future generations. Some, indeed, find their own personal immortality in that of the State<sup>1</sup>: others cannot deny the claims of their own children or those of their family in a wider sense, and work to make the State a 'better place' for them.<sup>2</sup> To maintain the continuing association becomes so paramount a consideration with most men that they give money, energy and obedience, and regard the consequent burden as a light one compared with the promised results. This is particularly true of war for the defence or increase of a country's dominions. Another aspect of it is interestingly observable in the Fascist movement in Italy; almost the whole appeal to the people to suffer subordination and discipline is expressed in terms of the State's Futurity, and the Corporative Constitution begins: 'The Italian Nation is an organism having ends, a life and means superior in power and *duration* to the single individuals or groups of individuals that compose it.'<sup>3</sup> This also was the essence of the German Romantic political philosophy which took its keynote from Burke's superb phrase:

'Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts, wherein, by the disposition of a stupendous wisdom, moulding together the great mysterious incorporation of the human race, the whole, at one time, is never old, or middle-aged, or young, but in a condition of unchangeable constancy, moves on through the varied tenour of perpetual decay, fall, renovation, and progression.'<sup>4</sup>

Feelings like these are evoked in the majority of men and women by the modern State more than by any other institution of our day. There was a time when the Churches lived by such sentiments and taught and succoured the poor, as a result, but the days have gone by, whether to come again is another question. In virtue of these sentiments the State acquires authority and power, for men will obey its commands when these things are recalled, though obedience is otherwise distasteful.

Then the State extends, as a rule, over a wider territory than other associations, and wherever territorial extent of authority is technically essential to effective and economical operation, as, for example, in factory supervision and labour regulations, health administration, the

<sup>1</sup> Morley, *On Compromise*, concluding paragraphs; also the essay on Mill.

<sup>2</sup> This is immanent in Kant's view of the perfectibility of man; in the idea of progress; in the propaganda for widespread education; in democratic institutions; of equality before the law; the regulation of child labour; and so forth.

<sup>3</sup> *The Labour Charter* (Sect. 1), published on the Fascist Labour Day, 21 April, 1927; cf. Schneider, *The Making of the Fascist State*, 1929.

<sup>4</sup> Cf. Disraeli's *Sybil*; cf. Adam Müller, *op. cit.*

maintenance of standards of weights, measures and purity, the extirpation of unfair commercial practices, of sedition, or alcoholic liquors, in social insurance, daylight saving, the State has a better chance of success than other institutions.

Finally, the State is embodied in institutions and forms, more than any others, identified with the supreme guarantee of Stability and Order. Around Order battles have raged, millions of passionate pages have fluttered, and cruelty untold has been committed. Order means an established rule of life ; and this, seemingly, is an innocent enough desire, and is certainly one that is universally felt. Now, violent struggles have occurred to decide which, among all the possible millions of rules, should be established. But all people have found the need for security, and calculability of the immediate and distant future. Whatever men's ultimate values, all require at least some calculable basis ; it is impossible to live as most people wish to live if all standards, all behaviour, all rewards, all punishments, are to be in a state of flux and unpredictable vacillation, if wages, prices, opportunities of work, protection of person, postal communications, prevention of disease are casual and subject to no certainty of rule. Suppose social activities and obligations were as unpredictable, and more important, as uncontrollable, as the weather, and you will obtain some small forecast of the misery of men's lives. The weather does not matter very much, for all ordinary purposes, in a manufacturing country : but it means life and death to an agricultural people. And men in the past have been alternately so disappointed and elated at the hazards of the harvests, that they have attempted to reduce them to order by making the elements into Gods to whom they pray and sacrifice.<sup>1</sup>

Man has plotted out Time itself and charted the minutes and the days. The moment man becomes dependent upon others, even in the slightest degree, and as soon as social expectations are established, an Order must be maintained in the recording and valuation of Time.<sup>2</sup> Only the unsocial beings have no order in Time, such as infants and artists and tramps. But all others are bound to *fix* Time. So with all other aspects of human behaviour : some things must be fixed in order to relieve men of worry and anxiety, and to act as a set basis for all the superstructure of industry, religion, and family life, and be a measure of values and power. Men cannot bear the stress of encountering the unfamiliar, and prefer a predictable curve of events rather than the unexpected zig-zag of disappointments. This is, in fact, what makes people save instead of at once consuming all they produce. The words which usually describe the notion of the unexpected very well indicate the psychological conditions which cause Order to be

<sup>1</sup> An excellent discussion of this is in Frazer's *Lectures on the Early History of Kingship*.

<sup>2</sup> The best study I know of this is in Thomas Mann's novel—*The Magic Mountain*.

established : startle, take aback, stun, stagger, take away one's breath, crush, balk, blight, aghast, tantalize, dumbfounder. We do not delight in such feelings. Order is therefore natural to human kind : it breaks up the flux of events, sets bounds to the infinitely variable in human relationships, establishes predictable liberties and restraints,<sup>1</sup> and offers that without which men could not possibly control events. The State is one of the many institutions created, in part deliberately, in part unconsciously, to obtain the benefits of Order, and it offers this over a wider extent of human contacts, including more people for more objects over a wider territory, than any other institution. This service draws men to its support and often they are ready to pay for the frame of Order by giving up their claims to the quality of its contents. For example, the Prohibitionists deliberately sought a constitutional amendment, and now combat disobedience by the argument that the Constitution and Order are in issue against Anarchy.<sup>2</sup>

Nor is this all. The aid of the State is called for because though a large number of people might act simultaneously, continuously and similarly for the attainment of a desirable end, yet without a prearranged rule, there is possible, at any time, either too much or too little effort to assure the object. The State is regularity, and associated effort ; and thus overcomes the waste caused by people giving in the wrong proportion at the right time, or in the right proportion at the wrong time.<sup>3</sup> Further, the moods of men are changeable from day to day, and their passions function intermittently : for example, no man is uniformly and always brave, charitable, cleanly, honest, or devout.<sup>4</sup> If men acted independently, what confidence could one have in the possibility of a regular and continuous fire-brigade service,<sup>5</sup> poor relief

<sup>1</sup> Cf. Locke, *Civil Government*, II, Chap. IV : ' But freedom of men under government is to have a standing rule to live by . . . not to be subject to the *inconstant, uncertain, unknown, arbitrary* rule of another man . . . '

<sup>2</sup> ' If this amendment is nullified by disobedience, then the Constitution, that glorious and mighty thing, is torn up.' The issue is made one between Order and Anarchy. Cf. Haynes, *Prohibition Inside Out*, Preface : ' The real crux of the whole matter however is found in the fact that the problem has greatly outgrown the prohibition question, for, as in the 'sixties a greater problem than slavery grew out of that issue—the preservation of the Union itself—just so a greater problem than the Prohibition question has grown out of it and that is the preservation and sanctity of all law, the saving of the Constitution, the foundation of the Government itself. . . . It is no longer a question as to whether we are for or against the legislation, but it is whether or not we are for or against the Constitution of the United States and whether or not we will obey and support the laws of the land.' Cf. also the Chapter on Constitutions, *infra*.

<sup>3</sup> e.g. intervention by private persons to help the poor always offered a difficult problem to the State, and legislation attempted to stop it.

<sup>4</sup> Hence almost all unpaid administrative work has been superseded in the modern state and it is only with immense difficulty that elected councils, parliaments, juries are made to serve. Cf. Part VII on *The Civil Service*.

<sup>5</sup> Cf. remarks regarding the L.C.C. Fire Brigade and its services to other local authorities in Report of Royal Commission on London Government, 1923, Cmd. 1830.

and organization of the labour market, hospital care, sanitation and public hygiene, sobriety, and contribution to common revenues on the basis of ability? <sup>1</sup> None. On some days, some things would be given in too great a measure for the object; on others, the supplies would be inadequate. Intermittency of passion, alternation of moods, defective synchronization of other pursuits, render a common rule and a special instrument indispensable. Hence the cry for the State, which is a cry for the imposition and common acceptance of a rule, ultimately controlling behaviour, to regulate passion, moods and attention, and to direct and apply them to an associated purpose.

## II

The State's activity is never much, if at all, better in quality than the morality, the wealth and knowledge of the individual and groups which form the State.<sup>2</sup> It often happens that the best brains and characters in society do serve the State, being attracted thereto by a sense of public service, and the dazzling vision of its supremacy, but the number of such minds is small compared with the aggregate which remains in private industry, science, education, the Churches and elsewhere. Generally there is no higher level, more often a lower level in the Cabinets and Parliaments; and the incentives of officials take their tone, too often, from the social circles from which they are recruited.<sup>3</sup> Whether there shall be competence, justice, generosity and other features in the activity of the State depends on whether these things are already present in society and the State has no special additional qualities better than the level attained by its environment.

<sup>1</sup> It takes the State an extraordinary amount of organization and effort to prevent evasion in Income Tax collection.

<sup>2</sup> e.g. in the Spanish Inquisition of the sixteenth century (cf. Lea, *The Spanish Inquisition*, 4 vols.): if torture is used everywhere the State will probably employ no nobler methods of attaining its end: a jury cannot be much better than the average man and woman. Health Administration depends upon the general philosophy relating to the length and vigour of life (it is noticeably indifferent in France and noticeably enthusiastic in the U.S.A.) and may have to fight for its efficiency against doctrines of religious fatalism, as in England in the middle of the nineteenth century, as now in India, and as one day, perhaps, in America (as soon as Christian Science supersedes all other religions). In the U.S.A. torture and tyranny are, in the institution and maintenance of Prohibition, either entirely impossible or practised with restraint and safeguards. Moreover three factors of modern civilization were present, and greatly affected the situation: (1) America is a democracy and therefore a demonstrable majority of the voters must be obtained for any law, and for a constitutional law a two-thirds majority and more (in some countries a referendum is required) and ratification by three-fourths of the States; (2) the notions of freedom of opinion and individual property, besides having been given exceptional safeguards in the constitution, are strongly supported by public sentiment as basic political necessities; (3) wealthy and powerful counter-organizations of the liquor traffic had been established in accordance with modern practice, and these, besides being an obstacle to the growing movement, might later undertake a campaign for nullification of its accomplished purpose.

<sup>3</sup> For example, in the United States where private industry has set the dollar standard, and has brought State services into contempt; but in Germany the social circles from which Civil Servants have been hitherto drawn hold the service of the State in the highest esteem. Cf. also Part VII, *The Civil Service*, Chap. 3.

On the whole it may be said that the State is better off now in this respect than in the past, and becomes increasingly better, owing to the establishment of methods of training and discipline, and these are considered in the chapters relating to Parties, which select legislators, and the Civil Services.

### III

The State does not become active unless there are individual and social forces moving towards this end: spiritual forces, that is, productive of community and association for any particular policy. These forces are of many kinds, and are engendered by man's nature and by environment, both of which create problems. It is not absolutely essential that the forces should be articulately expressed, it is enough if they are felt, even as a vague discomfort or yearning, but they must exist if the State is ever to become active. Fundamentally, whatever their superficial aspect, they have been conceived by individuals and groups as matters of Morality and Salvation: thus in Prohibition,<sup>1</sup> thus in the Spanish Inquisition,<sup>2</sup> thus anti-Trust legisla-

<sup>1</sup> Cf. *Platform of 1880*, printed in: *Prohibition in the United States, a History of the Prohibition Party and of the Prohibition Movement*, by D. Leigh Colvin, London and New York, 1926, p. 124:

(1) 'Alcoholic drinks whether fermented, brewed or distilled are poisonous to the healthy human body, the drinking of which (*sic*) is not only needless but hurtful, necessarily tending to form intemperate habits, increasing greatly the number, severity and fatal termination of diseases, weakening and deranging the intellect, polluting the affections, hardening the heart and corrupting the morals, depriving many of their reason and still more of its healthful exercise and annually bringing down large numbers to untimely graves, producing in the children of many who drink a predisposition to intemperance, insanity and various bodily and mental diseases, causing a diminution of strength, feebleness of vision, fickleness of purpose and premature old age and producing in future generations a deterioration of moral and physical character . . . alcoholic drinks are thus the implacable enemy of man as an individual.

(2) That the liquor traffic is in the home equally an enemy. . . .

(3) That to the community it is equally an enemy, producing demoralization, vice and wickedness, etc. . . .

(4) That in the state it is equally an enemy, legislative inquiry, judicial investigation and the official reports of all penal, reformatory and dependant institutions showing that the manufacture and sale of such beverages is the promoting cause of intemperance, crime, and of demands upon public and private charity: imposing the larger part of taxation, thus paralysing thrift, industry, manufacture and commercial life which but for it would be unnecessary: disturbing the peace of the streets and highways: filling prisons and poor houses: corrupting politics, legislation and the execution of laws: shortening lives, diminishing health, industry and productive power in manufacture and art: and it is manifestly unjust as well as injurious to the community upon which it is imposed and contrary to all just views of civil liberty, as well as a violation of a fundamental maxim of our common law to use your own property or liberty so as not to injure others.'

Colvin, *op. cit.*, pp. 57, 69, 73, 146, 261, 267, 286: Again and again was God invoked 'as the wrathful judge of our liquor traffic': 'In His name we set up our banners'; 'People who fear God . . .'; 'Our reliance for ultimate success upon the same Omnipotent Arm . . .'; 'the man and woman who cries "Wait!" and "Go slow!" is an enemy to God and Humanity'; 'liquor is contrary to the spirit of God's Word'; 'the Church of God is the relentless and uncompromising foe of the ungodly business!'; 'The Prohibition Party, the party of God.'

<sup>2</sup> 'No one,' St. Augustine had said, 'cometh to salvation and eternal life except he who hath Christ for his head, and no one can have Christ for his head except that is in his body the Church.'



tion, thus public health,<sup>1</sup> and so on. Shall men strive for greater economic satisfaction? is not only a question relating to physical needs, to food, clothing, shelter, furniture, gardens and motor-bicycles, yachts and books, but involves the ultimate question why so much of these things and why so little? Because. . . . This 'because' when we have arrived at ultimates is the individual's ultimate justification of himself and is expressed in vague but compelling terms like God,<sup>2</sup> the Devil, Good and Evil, Sin, Justice, Salvation and Damnation,<sup>3</sup> Fair and Unfair, Good Form.<sup>4</sup> These are the moral ultimates of individuals and associations and they determine the scope and the direction of their energy. It may be said that these ultimates are not moral, but physiological, being dependent in the last resort upon the physical composition of human beings, upon their glands, the quality of

<sup>1</sup> Cf. Charles Kingsley's *Two Years Ago*, 'Cleanliness is next to Godliness'!

<sup>2</sup> Cf. The French Declaration of Rights of 1791 made, according to the Preamble, 'in the presence of the Supreme Being'.

<sup>3</sup> 'The heretic is a pestilential animal.'

<sup>4</sup> In the other examples of State activity we find the same intensity of feeling.

(i) *Anti-Trust Legislation.* American Anti-Trust Legislation is represented principally by three laws: the Sherman Act of 1890 and two Acts passed in 1914, the Federal Trade Commission Act and the Clayton Act ('to supplement laws existing against unlawful restraints and monopolies and for other purposes'). (See Henderson, *The Federal Trade Commission*.) From 1880, agitation against trusts began to seethe in the name of a fair field for the small trader and low prices for the consumer, and the titles of periodicals amply convey its direction and animus: *Modern Feudalism*, *The Moloch of Monopoly*, *The Bugbear of Trusts*, *Dangerous Trusts* (see O. W. Knauth, *The Policy of the United States towards Industrial Monopoly*, 1914, p. 14).

(ii) *Wages Control in Australia.* Cf. E. M. Burns, *Wages and the State*, Chap. IV. The Encyclical of Pope Leo XIII on the *Conditions of Labour* reinforced the growing conviction in the 'nineties that 'Preservation of life is the bounden duty of each and all, to fail wherein is a crime'.

(iii) *Daylight Saving.* The *Summer Time Act* of 1918 adopted for the war period, re-enacted in 1922 and 1923, was made permanent in 1925. William Willet, the originator of the scheme, expressed his beliefs in the pamphlets of the years 1907-14, 'Withdrawal of some of the hours of wasted sunlight in Spring, Summer and Autumn from the beginning to the end of the day' making for health and strength of body and mind; 'benefits afforded by parks and open spaces would be doubled'; 'Light is one of the greatest gifts of the Creator to man.' Then followed the baser advantages or the estimated saving of light and fuel (calculated to be £2,500,000 per annum). The full creed was embodied in the earnest resolution 'that the passing of the Daylight Saving Bill would conduce to the physical, mental, moral and financial welfare of the nation, and that it is deserving of the support of all classes of the community'.

(iv) *Food Control in Great Britain during the War.* The measures of the war years (e.g. Extension of Powers under D.O.R.A., the creation of the Ministry of Food under the direction of a Food Controller (1916), the establishment of (local) Food Control Committees (1917) and the complex rationing schemes of 1918 instituted an elaborate system of Governmental control of food supplies. Fear and resentment at the rise of prices (Beveridge, *British Food Control*, Chap. III) instigated the demand for government action; notions regarding 'rings' and 'profiteers' lurked in the popular mind, whilst more sober views found utterance in the House of Commons: 'in the opinion of this House it is the duty of the Government to adopt further methods of organization, to increase and conserve the national food supply and so diminish the risk of shortage and serious increase in prices in the event of the war being prolonged' (cf. W. A. S. Hewins in Debate, 15 and 16 November 1916—cited Beveridge, op. cit., p. 24).

their senses, the brain-matter, the nerves, and organic functions. Be it so ! But men have called these things God or the Devil. Every man is a fanatic about something ; he is convinced that something is of higher moral or God-value than all other things : it may be Immortality, World Peace, Patriotism, Comfort, Music, Paintings, or the provision of cheap postal facilities in rural areas, and it is this fanaticism which, at a certain temperature, involves the association of others to secure its satisfaction and social realization.

Zealots believe themselves providentially appointed to undertake crusades and they regard plain occurrences as divine intervention.<sup>1</sup> The best contemporary example of this relates not to existing State activity but only to that which is advocated. The most radical Bernard Shaw, the great divine, proposes the Equalization of Incomes. If the reasons for this reform are followed, step by step, back towards the ultimate moral basis, we arrive at the Life Force, that which is before reason, and causes us to choose and contrive.

‘ I tell you that as long as I can conceive something better than myself I cannot be easy unless I am striving to bring it into existence or clearing the way for it. That is the law of my life. That is the working within me of Life’s incessant aspiration to higher organization, wider, deeper, intenser self-consciousness, and clearer self-understanding. . . . ’<sup>2</sup> ‘ Just as Life, after ages of struggle, evolved that wonderful bodily organ the eye, so that the living organism could see where it was going and what was coming to help or threaten it, and thus avoid a thousand dangers that formerly slew it, so it is evolving to-day a mind’s eye that shall see, not the physical world, but the purpose of Life, and thereby enable the individual to work for that purpose instead of thwarting and baffling it by setting up shortsighted personal aims as at present.’<sup>3</sup>

This Shavian ultimate finds its complex incarnation in concrete suggestions for the reform of human behaviour and seeks to find its expression, if necessary, in the State.<sup>4</sup> And so with all such ultimates.

What causes them to be given validity in the State, rather than left to find expression in the life of the individual or of minor groups ? Simply that the strength of conviction, or the scope of knowledge and imagination, are of a degree insatiable without extension of their com-

<sup>1</sup> Thus Torquemada (cf. Lea, I, 175) : thus Bismarck and German Federalism (after the attempt on his life) ; thus Shaftesbury (cf. notes from his diaries in Hodder’s *Life*). Thus Silas C. Swallow, the Methodist minister, a leader of the American Prohibitionist Party (Colvin, op. cit.) : ‘ You want a man to be your leader who shall be as straight and as tall as the young Saul. He must be as fearless and unsparing in the denunciation of sin in high places as was John the Baptist. He must be as untiring and persistent as Paul. He must be as ready for sacrifice as Stephen. He must be as sweet-tempered as a Melancthon. He must be as pure, clean and noble-minded as a John Wesley. In a word he must be such a one as shows by his life that he is an act of God, his mind a thought, his life a breath of divinity. Such a man, ladies and gentlemen of the convention, I have the honour to present to you in the person of—Silas C. Swallow’ (Convention of 1904. Dr. Swallow was a Methodist minister, an elder, and for eleven years editor of the *Pennsylvania Methodist*).

<sup>2</sup> *Man and Superman*.

<sup>3</sup> *Ibid.*

<sup>4</sup> Cf. also, since this was written, *An Intelligent Woman’s Guide to Socialism*.

mands and consequences to the appropriate area or number of people. If the æsthetic, for example, is the driving force, then wherever there is ugliness, on advertisement hoardings, for example,<sup>1</sup> or drunkenness,<sup>2</sup> its removal will be desired and the intensity of desire conditions the permissible means: persuasion, confiscation, imprisonment, death. If, to take another example, the ultimate is Charity, and this in one aspect means the prohibition of chimney-sweeping by infants,<sup>3</sup> a time arrives when it is desired that all who employ such infants shall be properly restrained, and the resources for this restraint will be claimed from other people. What is the justification for such claims? It is idle to talk of justification, for in the ultimate resort the word means nothing—justification is physical and psychological necessity, and this arises out of the contact between individual nature and social and material environment. 'I am that I am!' is the ultimately inexplicable sense of the personal Supreme Good. When this sense is so keen and of such substance, that it issues in a demand for social activity, the State is approached in proportion as success requires inclusion of (1) all the inhabitants, (2) all the territory, (3) all the available resources; for the smaller societies have proved, by hypothesis, deficient in these respects.<sup>4</sup> It must, of course, be remem-

<sup>1</sup> Cf. *Annual Reports of the National Trust for Places of Historic Interest or Natural Beauty*, and its pamphlet entitled *Must England's Beauty Perish?* written by Professor G. M. Trevelyan.

<sup>2</sup> Cf. Beman, *Prohibition*, New York, 1924, Chap. II, and *Senate Judiciary Subcommittee Hearings*, 2 vols. (Washington, 1926), I, 207-50, on prohibition in the family and industry before the advent of State Prohibition.

<sup>3</sup> In 1853, when endeavouring to get a Bill passed to remedy the imperfections of the existing Act, Lord Shaftesbury said 'he did not believe that all the records of all the atrocities committed in this country or in any other could equal the records of cruelty, hardship, vice and suffering which under the sanction of the law had been inflicted on this miserable and helpless race'. Cited Hodder, *Life and Work of the Earl of Shaftesbury*, London, 1887, p. 586.

<sup>4</sup> This manifests itself in attempts to secure universality and uniformity of influence and behaviour. In the Inquisition it was recognized that the existence of even one heretic threatened the true believer with contamination, and exhaustive methods were employed to destroy the infidel even at the risk of persecuting the believers also.

(i) *Factory Legislation*. In the years 1864, 1867, the operation of the Factory Acts was extended from the 'factory districts' to the whole country. This increase in area was not a mere by-product of legislation, but quite in accordance with the Reports of Factory Inspectors and Royal Commissions: jealousy and friction between employers in the same locality, yet subject to different regulations, were inevitable (see Hutchins and Harrison, *A History of Factory Legislation*, p. 123). Moreover, 'unless all (manufacturers) can be brought to concur, those who kept themselves unfettered would enjoy an advantage over the rest'; hence the need for 'the supreme authority' to 'coerce the reluctant minority' (see *Children's Employment Commission, Parliamentary Papers*, Vol. XV, 1843, p. 36). Similarly, fear of foreign competition (as well as 'reformist' motives), has stimulated the growth of international labour regulation. The International Labour Organization, created by the Treaty of Versailles is both permanent and important. Note, in 1919, Regulation of Hours, Night Work, Minimum Age, White Lead, etc. Cf. *Ten Years of the League*, and Greaves, *The Committees of the League*.

(ii) *Regulation of Weights and Measures*. The original system of administration by heterogeneous local authorities (see *Royal Commission on Local Government: 1923*,

bered, that the intensity of conviction available and striving for expression in State activity, depends not only upon the absolute amount of any particular conviction in a person or group, but upon its relation to other motives which act as additional impulses or as restraints. For example, a general belief that freedom is good may neutralize a strong impulse that alcoholic liquors<sup>1</sup> or child-labour should be prohibited, or sickness among the poor stamped out.

Minutes, Vol. II), was felt to be inadequate in the nineteenth century. The general discontent was expressed in the Act of 1824: 'whereas it is necessary for the Security of Commerce and for the Good of the Community that Weights and Measures should be just and uniform . . . yet different Weights and Measures are still in use in various Places throughout the kingdom of Great Britain and Ireland . . . which is the Cause of Great Confusion and of manifest Frauds'. Uniformity throughout Great Britain and Ireland was attained by the subsequent legislation of 1874, 1878 and 1892. The adoption of the metric system by Great Britain is advocated for the facilitation of *international trade*.

(iii) *Daylight Saving*. Between the years 1908 and 1916, in the discussions on the Daylight Saving scheme the compromise of 'local option' was quite frequently suggested. Had a 'permissive' Act been passed great disorganization would have resulted. So strong is the case for uniformity that the divergence which would arise between British and Continental time was urged as an overwhelming objection to the measure in any form. Although the divergence has not proved itself insuperable, there are many reasons (e.g. Railway and Shipping difficulties) for advocating a single international arrangement.

(iv) *Public Health Administration*. The ravages caused by infectious diseases (e.g. the Cholera epidemic of 1831) throw light on the problems underlying all public health questions: Any badly administered area is a menace not only to the inhabitants thereof but to the whole community; effective administration can be obtained solely by central control and by the elimination of dangerous local autonomy; the greater the area, the greater the benefits to be derived from medical and sanitary knowledge. Cf. the history of the relations between the Ministry of Agriculture and the 330 local authorities administering the Diseases of Animals Acts (*Royal Commission on Local Government*, 1923, Minutes of Evidence, II, 263).

(v) It was found that temperance by means of local option would prevent the contamination of a local government district by a few of its residents; but then the district could not be kept 'dry' unless the whole country around it were 'dry'; when the country was 'dry' by local option it could suffer damage from their illicit importations from the neighbourhood, and so the next step was State-wide prohibition, and when this raised wellnigh insoluble problems of enforcement, owing to inter-State traffic, the next step was prohibition over the whole of Federal territory; and even now the existence of the liquor-traffic outside the frontiers of the U.S.A. is a constant menace to prohibition within, for the long frontier and the seabords present an administrative problem of the greatest difficulty, and this has involved the whole international question of rights of search in territorial waters. Thus the Inquisition was promoted by the Spanish hatred and jealousy of the prosperity of the Moors and Jews (cf. Lea, I, 77).

<sup>1</sup> In the U.S.A. a practical and theoretical struggle between 'natural' and 'political' liberty. The theoretical issue was settled in the case of *Crowley v. Christensen*:

'It is a question of public expediency and public morality and not of federal law. The police power of the State is fully competent to regulate the business to mitigate its evils, or to suppress it entirely . . . the possession and enjoyment of rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.'

Note also Louis Shade, editor of the *Washington Sentinel* at the Beer Congress in 1875: 'No gentlemen, first personal and then political liberty: first beer and

## IV

Now if the human and environmental forces operate at a certain pitch of intensity there will be State activity whether the politicians and statesmen, all those officially occupied with politics, desire it or not. It depends upon the intensity of the feeling, and upon the insensitiveness of the official legislators, with their calculations of personal advantage, how long the transmutation of social forces into State activity can be retarded, and how long, on the other hand, a struggle is necessary to effect such a transmutation. We have seen how *laissez-faire* and conceptions of individual liberty were broken by necessity; and we have had the opportunity of observing how State collectivism has suffered in past centuries, and more recently in Russia.<sup>1</sup> Legislators were harried and threatened into Factory<sup>2</sup> and Health<sup>3</sup> legislation in England, into great economic reforms in Germany,<sup>4</sup> into Prohibition in the U.S.A.,<sup>5</sup> and at frequent intervals social forces, pent up, have even issued in revolution to replace the old legislators by new, and to cause a proper correspondence between social conviction and State activity.

then politics.' There were of course many far less enthusiastic in the cause of the brewer, who were doubtful of the advisability of prohibition.

This issue of the difference between liberty and freedom, which arose clearly enough in the case above considered, arose equally in other subjects of State activity, most particularly in Anti-Trust legislation and in Legislation of *Federal Trade Commission v. Gratz*, 1919, 253, U.S. 421: Mr. Justice Brandeis (dissenting) gives an account of the functions of the Federal Trade Commission: 'If it discovered that any business concern had used any practice which would be likely to result in public injury . . . the Commission was directed to intervene. . . . Its action was to be prophylactic.' Public Health Administration has had frequent conflicts with 'personal liberty' doctrines; e.g. in connexion with compulsory notification of disease, vaccination and the right of entry.

<sup>1</sup> Cf. Dobb, *Russian Economic Development since the Revolution* (1928), and cf. Stalin's report on the economic future of Russia: *The Times*, July, 1931, and the *New Statesman*, 17 and 24 July, 1931.

<sup>2</sup> Cf. Hodder, op. cit.; Hammond's *Shaftesbury*; and Hutchins, *History of Factory Legislation*.

<sup>3</sup> Cf. Chadwick's Report on *The Sanitary Conditions of the Working Class*, 1839; *Select Committee on the Health of Towns*, 1839; Royal Commission on the *Health of Towns and Populous Places*, 1844-5, etc., etc. Witness the effects of the cholera epidemics of 1831, 1848 and the threat of 1869. Cf. Simons: *English Sanitary Institutions*; Hutchins: *The Public Health Agitation in England*, Royal Sanitary Commission, 1869: Report 1871.

<sup>4</sup> Here it needed the Socialist struggle of 1879 (cf. Mehring, op. cit.) and the work of the Social Democratic Party, culminating in the Revolution of 1918.

<sup>5</sup> This required the organization of the Prohibition Party (cf. Colvin, op. cit.) and the Anti-Saloon League (cf. Odegard, *Pressure Politics*) and the mobilization of all the Christian Protestant Churches. A prolific press was established (cf. Odegard, p. 15); numerous speakers were employed (cf. Odegard, p. 21); ribbons, badges and medals were distributed especially to those who recited the poems and song composed for the movement (cf. Colvin, op. cit.); a 'lobby' was established at Congress and the State Legislatures (cf. Chapter on Parliaments *infra*) and candidates were run. 'One candidate who incarnates our principles is of more political value to our cause than ten thousand signatures to a petition. But great petitions are great educators of the people. A Prohibition Candidate is like a lightning rod—he draws the electricity of public sentiment on the question of which he is the exponent. Embodied issues are sure to condense public thought.'

If the State undertakes any activity which is not based upon the necessary intensity of conviction in a sufficient number of people, it is not possible for it to be successful for long. The *duration* of successful State activity depends upon the duration of the convictional energy nourishing it, and as conviction flags, State activity deteriorates. Thus, it may be possible to get almost perfect success for a time, when the people are strangely excited, as in a war, or after extraordinary events like earthquakes or epidemics or upon the accession to power of a man or woman whose personality is abnormally compelling.<sup>1</sup> So in Prohibition, the advent of which was aided by the war, the inquisition which acted remarkably under Torquemada by the ascription of the causes of certain plagues to the presence of heretics like Jews and Moors, education which increases in importance as people realize its significance, action against those charged with sedition in times of wartime delirium;<sup>2</sup> so, again, in the acceptance of food rationing in war time; so also in the régimes of Italy and Russia. When conviction does not naturally reach an intense pitch, and when it is short-lived, successful State activity is impossible without a special process of stimulating feeling and spreading knowledge, the latter being frequently a means to the first.

**Stimulation.** Those most conscious of these latent forces are obliged to stimulate them to a point which will produce activity. To this end they try to disengage, exactly and conspicuously, the lineaments of the forces to be promoted or controlled. As the common phrase goes they are obliged 'to bring home' the matter to those who have the psychological and physical power at their disposal; they act in the manner of Gambetta when he cried: 'Clericalism—there is the enemy!'<sup>3</sup> They are obliged to single out, identify, enlarge upon,

<sup>1</sup> For example, in the systems of Colbert, Napoleon, Bismarck, Mussolini and Lenin. Of Napoleon it was said that he 'could accomplish the miracle of the real presence', that is, his representatives worked as though he were in the room directing them.

<sup>2</sup> Cf. Post, *The Deportation Delirium of Nineteen Twenty*; and Chafee, *Freedom of Speech*. So also in the régimes in Italy or Russia. Or, again, in the acceptance of food rations during the war, accepted, though with much grumbling, while danger was present, and victory said to depend upon it; and when, in Germany, victory was suddenly revealed by the High Command to be impossible, the fortitude of the populace gave way. Cf. Rosenberg, *Die Entstehung der deutschen Republik*; also Bernard Kellerman, *The Ninth of November*, a novel of Berlin life in the war years.

<sup>3</sup> Thus hatred is inculcated against the disobedient in the Inquisition by appeals to race differences, during the Prohibition campaign by emphasizing the evil uses to which the saloon was put, and by portraying the liquor dealers as lumbering louts big of tooth and mouth, heavily moustached, broken-nosed and glint-eyed, and always distinctly foreigners; honours, such as the recognition of 'purity of blood', were promised by the Inquisition to the obedient, and punishment of the lukewarm threatened to such as showed ordinary commercial friendliness to those outside the pale; or men are stigmatized by badges, segregation, and epithets (e.g. 'paupers', cf. Webb, *English Local Government, Poor Law History*, Pt. I, pp. 151, 160-1; Marshall,

'boost', the object. They are obliged to produce a sense of urgency to abolish the evils and acquire the good; to prove by whatever evidence is acceptable, how evil the evils are, how valuable the attainable good. This process of stimulation produces the disposition to obey when the orders are given as soon as the 'movement' is under way, and when a settled administration is established.

Democracy itself is kept alive only by constant demonstrations in its support, a high percentage of voters is only maintained by canvassing and propaganda, people are worried into keeping the nation healthy by meetings presided over by prominent persons and by 'Health Weeks', while the State threatens to make a hash of its campaigns against Rats and Mice unless it can secure co-operation by frightened house-dwellers and warehousemen. For this process there is a technique appropriate to the psychology and historic association of the people to be convinced, and based on the apparatus of propaganda such as printing, rhetoric, the drama, lighting effects, the recording of speech and song, and its artificial reiteration and amplification. Experience has shown that no great branch of State activity (or the activity of any society) has been advocated or resisted without this technique including an armoury of Lies.<sup>1</sup> For the agitator and the zealot cannot perceive that their arguments are so exaggerated that the Truth is continuously suppressed, while they magnify beyond the true limit the untruths of their opponents. So always and to-day in all political parties. These distortions are partly unconscious—that is, for the zealot they are quite genuinely non-existent, but to some extent they are consciously used because they are known to have force with those to be persuaded, and the form in which they are used depends

*The English Poor in the Eighteenth Century*, p. 102; and for 'heretics', see Lea, op. cit., I, 77-9; or the characters, persons or objects to be combated are exaggerated, as in prohibition by cartoons, caricatures and graphic statistics (cf. Odegard, op. cit., p. 43, and Colvin, op. cit., pp. 178-9). Special names are invented for the socially stigmatized, doctrines are incessantly and conspicuously reiterated, as in the Inquisition by the reading of Edicts of Faith and by Processions (see Lea, op. cit., II, 93), in Prohibition by songs, rhymes and rhetorical campaigns, etc. (cf. Colvin, *ibid.*), until the public sees with the clarity and feels with the intensity of the leaders. In the case of Prohibition it was necessary to create two parties: The Prohibition Party in 1869 and the Anti-Saloon League in 1874 with a nation-wide organization on the most up-to-date lines (cf. Colvin, op. cit., pp. 68 ff., and Odegard, 1928).

<sup>1</sup> As in the Inquisition by the segregation of the Jews and Moors into Morerias and Juderias (cf. Lea, I, 77) in order to distinguish them clearly, and then to stimulate the antagonism of the population, even to the point of massacres. Any untoward event, such as a plague, which came from the perfectly natural causes of malnutrition and uncleanness, was exhibited by the leaders as produced by the enemies of Christ. The Jews were represented as poisoners, murderers, and incendiaries (Lea, *ibid.*, I, 149), and it was stated that their physicians killed Christian patients (Lea, *ibid.*, I, 134).

So also with the prohibitionist in America; faced with the difficulties of constitutional amendment, obstructed by the notions of freedom of opinion and rights of property obtaining in the United States, and confronted by powerful counter-organizations of the liquor traffic, he created a new Party and used every known modern device of propaganda to achieve his end (cf. Colvin, op. cit., pp. 178, 179 and 281).

upon the leaders' estimation of the mentality of those he has to convince; it is therefore variable with people and times. Plato, it will be recalled, proposed that his State should be based upon certain Myths.

## VI

If the State commences to act before sufficient feeling has been generated, and before knowledge has adequately been spread,<sup>1</sup> or, if it tries to act when conviction has dissolved,<sup>2</sup> it cannot be successful<sup>3</sup> save by special coercion or special rewards.<sup>4</sup> It has to fine and imprison, sometimes even to kill, the dissentients, lest conviction be further weakened by imitation, and in the case of the dissentients themselves

<sup>1</sup> Instances of this are numerous. Early English Public Health Legislation or the Bolshevik regulation of agriculture. In the U.S.A. several states passed laws for the scientific teaching of Prohibition, and there is a continuous stream of educational propaganda (cf. Colvin, *op. cit.*, pp. 178-9).

In the Inquisition, lack of knowledge of what constituted heresy by the general population caused information to be laid against the wrong people or not at all (cf. Lea, I).

Similarly, in the attempt in Germany to secure workers' control of industry by the Works Councils Act of 1920 (cf. Guillebund, *Works Councils in Germany*) where, however, the law threatened to break down until (a) the Balance Sheet Act was passed in 1922 in order to force accounts of the economic situation into easily comprehensible forms, and (b) the Trade Unions created schools for works councillors (cf. Report, *Works Councils in Germany*, U.S.A. Department of Labour, 1926), where they are trained to use their rights properly.

So also with Public Health in the modern state (cf. Newman, *Public Opinion and Preventive Medicine*), where it is shown that the citizen must co-operate with the official and know what he is attempting if real success is to be obtained. Moreover, the Labour Exchanges set up in Great Britain in 1911 as a remedy for unemployment have largely failed owing to the non-user of them by employers (cf. Beveridge, *Unemployment*, 1930).

<sup>2</sup> As in post-war attempts to carry out schemes of social betterment promised during the war (cf. Fremantle, *Housing*); but most obvious perhaps in the case of Prohibition. It was to be expected, if this were true, that in proportion as the abnormalities of war and 'anti-foreign' psychology were reduced, the intensity of prohibition sentiment would be lowered and prohibition enforcement, if not the law, would be jeopardized. And this has actually happened. Moreover, men cannot live by prohibition alone; and somewhat ridiculously, the Prohibition Party complains that all men will not join it as a single-issue party. Of course not. Whoever lived his life upon a simple and single prohibition? Not the saintliest nor the most diabolical of men. It is therefore essential, politicians and people find, to include among their allies for causes like the Tariff, Child Labour Laws, general economic prosperity, and so on, both people who are not and people who are prohibitionists, etc., and these are obliged, if they wish to enjoy the general good which may accrue from the State, to wink their eye at a not too rigid enforcement of the law.

So with the downfall of State conformity in religion with the growth of natural sciences and rationalism, and the rise of economic acquisitiveness. Cf. Lecky, *History of the Rise and Influence of Rationalism*; Bury, *The History of Freedom*; Troeltsch, *Aufsätze zur Geistesgeschichte und Religionssoziologie*, IV (1925).

<sup>3</sup> Even when a majority has been secured. A majority is not a constant, loyal, compact group, but tends to change with time—a fact especially noticeable in Prohibition.

<sup>4</sup> Such as payment, distinctions, precedence, titles, special residences, uniforms, and in the Inquisition, immunity from prosecution by the ordinary courts, exemption from billeting of troops and from taxation. Cf. Trotsky, *My Life*: he finds that he cannot get all he wants from the Red Army without the award of medals and, in order to make the medals appear of worth, he is obliged to accept one himself. Cf. also Napoleon and the creation of the *Légion d'Honneur*.



to compel behaviour by sanctions other than the intrinsic value of the conviction itself.<sup>1</sup> As a rule, the convinced are so enraptured by the importance of their conviction,<sup>2</sup> that they go to great lengths, they shame, bully, and ostracise, and often torture and kill, to make others conform, and it rarely happens that the success of State activity has not as one of its incidents much real suffering. Indeed, given the nature of man and society to-day, government is impossible without such incidental violence, and this is due to the extreme diversity of interests and convictions, to the fact that citizens are rarely able to weigh their rights against their burdens and pains, whether in money or votes, and further, because the powerful impose their will upon others and call it 'State'. In order to mitigate the pains of unconvinced obedience and yet obtain success, the State has often had to organize the education of its citizens by formal public teaching, and by the issue of proclamations, preambles to laws, instructions on official forms and cards, and detailed memoranda and orders to local governing bodies.

## VII

If the factors already indicated are present in society, the State may still not be successful unless there are available for it the appropriate material resources.<sup>3</sup> There is rarely an activity of the State which does

<sup>1</sup> Cf. Chapters on the Civil Service, *infra*. Cf. the execution of the law on the separation of church and state in France, 1906-10 (Zevaès, *Histoire de la France*). Cf. also the Curragh Revolt and the Home Rule Act of 1914. It is certainly written throughout the history of the confiscations, imprisonments, galley-enslavement and torture of the Inquisition; and instances abound in the whole system of modern penalties for the enforcement of the various branches of administration.

<sup>2</sup> In every case the leaders obviously considered their convictions as the highest good, worth all sacrifice, including themselves. So, too, with Bismarck and the making of the German Confederation. Such men persuade others into burdens which to them are light, non-existent, or a positive ecstatic pleasure, but which become onerous to others, when, in the course of time, the intoxication of rhetoric and persuasion clears away. The history of the Inquisition and of D.O.R.A. provide further illustrations of this point.

<sup>3</sup> This is one of the greatest problems of State activity. In the Inquisition a host of officials—spies, informers, gaolers, examiners and executioners had to be employed. Indirect costs were even greater, and were in no manner counterbalanced by the fines and sequestrations. Persecution of Jews and Moors struck at the commerce and agriculture of the country, the creation of religious barriers destroyed economic relationships, confiscation and imprisonments depreciated the value of contracts and property, and the general instability was economically disastrous (cf. Lea, II, 231). Nor was the loss limited to the destruction of native assets. Economically valuable Protestant foreigners, attracted by the wealth and artistic appreciation of Spain, were driven from the country and killed in the attempt to isolate Spain from Protestantism. International commerce was crippled.

Prohibition equally has made claims upon the wealth of the U.S.A. The estimated direct cost of enforcement of prohibition is \$19,319,817 (for the fiscal year 1926). Total Budget, U.S.A., \$3,741,787,060. For 1928 the figures are: Enforcement, \$28,000,000; Total Budget, \$3,643,519,878. An efficient patrol and inspection along the tremendous boundaries and coast-lines would involve incalculable cost. Control of native supplies is impossible: it would involve prohibiting the growth of production of grapes, barley, rye and hops and the manufacture and possession of all industrial alcohol, or an inspectorate adequate to prevent the consumption of liquor derived from this source. None of these measures has been taken because the

not require material resources for its support, and this may mean one of two things, or both of them; either there must be an adjustment of the constituents of expenditure, less being spent on other things in order to make a fund for the new, or a greater aggregate amount must be somehow produced in order to pay for the new activity and yet maintain the other lines of expenditure unimpaired. In the former case the material sacrifice will lie in the decrease of other satisfactions; in the latter case, in the need to work harder to produce more. We may be asked to spend less in our own spontaneous way in order to contribute to some humanitarian activity, to eat less and support a Church, to buy fewer books and support shorter hours of labour, to have a less expensive house and better street lighting, to pay more for home-produced steel in order that something called the 'Empire' or the 'Commonwealth' may flourish, or be better prepared for war.<sup>1</sup> The normal way adopted by the modern State to bear the burden is to tax—that is to deprive us of part of our material resources. But this is not the only way in which members of the State are made to bear material burdens: for every activity of the State, even when there is no direct visible tax, alters economic conditions to the advantage of some and to the disadvantage of others. The tax, if we care to use that term, exists though it is not visible. The question is, can we, and will we if we can, give up other satisfactions for the one the State is to afford by its activity?

The activity which demands more than the utmost amount possessed or borrowable must obviously fall short of perfection. Yet there are schemes of State activity occasionally suggested which, upon analysis, are seen to depend for their efficacy upon more than society possesses or can acquire. But it is also true that some schemes like the nationalization of railways or mines might (but this should be carefully examined) cause an increase of the available resources. This is the uttermost limit of success which depends upon material resources. Further, society may desire not one, but a number—the more complex the society the greater the number—of State activities.<sup>2</sup> In such a

opinion which declared itself in favour of prohibition has not been willing to submit to payment for its enforcement, and the anti-prohibition forces have, in consequence, been proportionately more effective.

The cost of collection of British Income Tax (and the prevention of evasion) entailed direct cost of £7,250,000 in 1926-7 (Table 5, 70th Report of Commissioner for Inland Revenue for year ending 21 March 1927). It is clear that if absolute checks were set up against evasion, the cost of directly controlling all business accounts and the honesty of accountants would need to be added: also the cost of the detailed examination of items in returns. Cf. Trantor, *The Evasion of Taxation* (1923).

Daylight saving involves mainly indirect costs.

<sup>1</sup> Cf. Chairman's Report, June, 1931, J. and P. Coats, Ltd.

<sup>2</sup> E.g. in contemporary British Budgets: education and public health and unemployment insurance and defence forces and organization of the labour market, etc., etc. Cf. *Annual Finance Accounts*; or *Estimates*; or *Memorandum of Pre-War and Post-War Expenditures*. Prohibition, especially, has suffered from such competition. Cf. *Hearings, Senate Sub-Committee on the Judiciary*, I, 367, 390 ff.; Irving Fisher, *Prohibition at Its Worst*, New York, 1927, pp. 163, 164.

case, the resources to be spent upon any one activity are limited by the demand for resources for others, and this means that the success of one activity is limited by the intention to secure success in others. Those States are in the aggregate most capable where resources have been carefully portioned among the whole series of desires. The annual debates on public finance in modern Parliaments naturally centre around this apportionment, and Chancellors of the Exchequer and the Treasury Department acquire their important status therefrom.

## VIII

Given conviction, coercion and resources, success is attainable only in proportion to the clarity and precision with which the purpose of the activity is defined. The appropriate machinery and expenditure cannot be devised unless the aim is clearly defined; and the enterprise of officials either goes beyond the purpose or is stultified by uncertainty.<sup>1</sup> In the modern State these authorities are responsible

<sup>1</sup> (1) The early years of the Inquisition demonstrated this need: but a test of faith or heresy is not easily defined. The problem was aggravated by an ignorant population, for the people did not understand whether they were Catholics or Heretics, and the ease with which behaviour may be made to conform to the rough rules gave them safety.

Catechisms setting forth the beliefs and duties of Christians were published and used as the basis for cross-examination. Such tests were vague, and gradually the emphasis was put less upon belief, which was obscure, than upon race, which was thought to be indelible. Habits and customs and appearance divided the races comparatively unmistakably. In order to make the influence of the Inquisition complete, an index was gradually compiled containing the records of all suspects. A further test which was evolved during the sixteenth and seventeenth century was that of purity of blood, or *limpieza*, measured by the ancestry of the person in question. The result was twofold: to give the officials of the Inquisition a fairly automatic clue to suspects, and to furnish a preliminary means for sifting out candidates for office. On the whole, by their means, the Inquisitor was enabled to stamp out heretics, but only by exterminating many people who were not.

(2) Prohibition did not present such difficulties. The Volstead Law defined intoxicating liquor as that fit for beverage purposes which contains one-half of one per cent. of alcohol by volume, and the chief problem in this respect arose as to the quantity of alcohol allowable. As has already been pointed out, the existence of any machinery for making alcohol, or that of legal right to own it, is a danger to the successful administration of prohibition.

(3) *Public Health*. The red bands worn by persons recently vaccinated recall earlier practices. During the plague of 1629-31, 'The Lords of the Council required that infected houses should have guards set at the door and a red cross or "Lord, have mercy upon us" set on the door, that passers-by might have notice' (Sir J. Simon, *English Sanitary Institutions*, p. 96); cf. also Defoe, *Journal of the Plague Year*, and Creighton, *History of Epidemics*.

(4) *Weights and Measures*. The process of stamping weights and measures which have been verified by Inspectors and found in accordance with Imperial Standards, provides a satisfactory physical sign. (Until 1926 there was no general power to require measuring instruments to be stamped. Cf. Llewellyn Smith, *The Board of Trade*, p. 163.)

(5) *Nationality* (e.g., Poles and Irish). Although there is no infallible external test of nationality, language and appearance are important factors in this connexion. In the case of negroes there is less difficulty of distinction with regard to racial characteristics, but the offspring of mixed marriages have occasioned difficulty, notably in the United States.

(6) *Liquor Licensing*. There has been much discussion on what constitutes a 'club'. Clubs were exempted from the necessity of obtaining liquor licences on the assumption that a club was the house or home of its members; there was a 'distribution', not a sale of food or drink. The increase in the number of 'proprietary' clubs with 'wine committees' as 'camouflage' has given rise to a general investigation of the question. Cf. Minutes of Evidence, Royal Commission on Licensing, 3rd Public Session, 18 November 1929, pp. 48, 75. Definitions of drunkenness are also very uncertain. Cf. *Evidence of Royal Commission on Licensing*, passim, and *Police Journal*, 1930.

(7) *Anti-Trust Administration*. The administration of the American anti-trust laws has been seriously embarrassed by the problems of definition. The Sherman Act of 1890 entailed judicial interpretation of the phrase 'in restraint of trade'. In *United States v. Knight & Co.*, 1895 (156, U.S. 1), it was decided that Congress had not attempted to deal with monopoly directly. Further difficulty arose over the distinction between 'reasonable' and 'unreasonable' restraint (*Standard Oil Co. v. United States*, 221, U.S. 1). The passing of the *Clayton Act*, and the establishment of the Federal Trade Commission in 1914, were measures for combating unfair trade practices. 'The Commission is directed by Statute to prevent "unfair methods of competition" in interstate commerce' (Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, Chap. VIII). The work of the Federal Trade Commission is studied in *The Federal Trade Commission*, by G. C. Henderson, 1924. In this work the multitudinous purposes of the Commission are carefully analysed and the peculiar difficulty of each explained with great ability. Readers should also observe the various administrative devices created to cope with the various tasks. The great complexity of the purpose has proved to be a serious obstacle to successful State activity.

(8) *Wages Control*. In the *Harvester Case* (Australia) decision of 1907, Justice Higgins interpreted the phrase 'fair and reasonable' wages to mean a wage based upon 'the normal needs of the average employee regarded as a human being living in a civilized community'. This pronouncement of seven shillings per day as 'a Living Wage' was widely accepted. Nevertheless, there have been many divergencies due to different estimates of the size of a normal family and to adjustments according to a 'cost of living' index figure. Moreover, an alternative standard has been applied, namely, 'what the industry can bear'.

(9) *Poor Law Administration*. The definition of 'destitution' was discussed in the 'First Report of the Commissioners for inquiring into the Administration and Operation of the Poor Laws' in 1834. Destitution was identified with indigence, 'the state of a person unable to labour, or unable to obtain in return for his labour, the means of subsistence' (Copy of Report, House of Commons, 1885, p. 136). Moreover, 'the offer of relief on the principle suggested by us would be a self-acting test of the claim of the applicant. . . . By the means which we propose the line between those who do and those who do not need relief is drawn, and drawn perfectly. If the claimant does not comply with the terms on which relief is given to the destitute he gets nothing; if he does comply the compliance proves the truth of the claim, namely his destitution' (Report, pp. 158-9). Subsequent Poor Law history proved the automatic 'workhouse test' not to be a success. Cf. the discussion of 'physical' destitution in Report, Poor Law Commission, 1909, II.

(10) *Mental Deficiency*. The most recent test submitted is contained in the *Report of the Mental Deficiency Committee* (1929), Part II, p. 152: 'It is sometimes held that the only criterion of mental defect for the purpose of these definitions is the educational one. In the light of all the other definitions contained in the Mental Deficiency Acts, and of the best scientific opinion, we have taken the view that, whatever may be the correct legal interpretation of these definitions, the real criterion of mental deficiency is a social one, and that a mentally defective individual, whether child or adult, is one who by reason of incomplete mental development is incapable of independent social adaptation.' Cf. also *Psychological Tests of Educability* (Board of Education), and Cyril Burt, *The Young Delinquent*.

(11) Much injustice was done in U.S. decisions on charges of sedition, until there was a clear and reasonable definition: whether the words used are used in such circumstances and are of such a nature as to 'create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree'. Cf. Justice Holmes, in *Schenk v. U.S.* (249, U.S. 47 (1919)); cf. Chafee, op. cit.

for definition : the groups which advocate the purpose,<sup>1</sup> the public which is canvassed for its support,<sup>2</sup> political parties which organize the electorate and offer them satisfaction in return for votes,<sup>3</sup> the parliamentary bodies which discuss the proposal with more detail and state the intention in law,<sup>4</sup> the Cabinet which initiates and guides this discussion,<sup>5</sup> the technical experts like the Civil Service and special commissions of inquiry who bring exactly recorded science to the solution of problems where these are soluble only by such application,<sup>6</sup> and the Civil Service and Courts of Law who must interpret the purpose in its relation to specific cases.<sup>7</sup> If these define and fix the purpose well, State activity is successful, if not, their shortcomings are translated into its failure.

## IX

Nor is this all. The State must have at hand an executive machine. It must solve the problems of its *personnel*, its *technical apparatus*, and its *territory*.<sup>8</sup> (1) It must secure officials sufficient in zeal, honesty, knowledge and numbers, establish material and spiritual rewards which will produce the qualities needed when they are not spontaneously available.

Now there are not many men or women in the world who have the ability to fulfil the extraordinary demands of the difficult offices ; or, again, other satisfactions may pre-empt their energies. This is true of every branch of administration, and of all arts, crafts and sciences. While we recognize the truth in everyday life, that the world is a place in which the average of ability is low, and that genius is rare, we seem to expect more of it in State activity than elsewhere, or, at least, we tend to expect such a quality of enterprise by the State that only more genius than the world's actual supply would be required to produce it.

<sup>1</sup>, <sup>2</sup> Cf. *Part IV : The Sovereign Majority*.

<sup>3</sup> *Ibid*.

<sup>4</sup> Cf. *Part V : Parliaments*.

<sup>5</sup> *Part VI : The Executive*.

<sup>6</sup> Cf. *Part VII*.

<sup>7</sup> Cf. Chapter on Separation of Powers.

<sup>8</sup> Thus under the Inquisition special tests of race, parenthood and belief were set up as essential conditions of becoming an official, and attempts were made to preserve the high standard thus attained by solemn oaths, the recitation of daily prayers, and the granting of special privileges and those who thus served God.

The U.S.A. has not a good administrative record, and the Prohibition Laws have proved a test which a civil service but lately withdrawn from the spoils system has been unable to satisfy. There is no long tradition of professional zeal, competence and honesty ; but in the face of these disadvantages care has not been taken by those in control of appointments and high offices to select any administrators of the prohibition departments. In addition, the police, who also had a bad reputation under the pressure of huge bribes and threatened assault, have in many instances succumbed to the influence of the bootlegger. The story of 'graft', bribery, scanty salary and equipment, inefficient organization is to be read in the following literature : *Hearings, Senate Sub-Committee on the Judiciary, 1926 and 1930* ; Haynes, *Prohibition, Inside Out*, and Bruère, *Does Prohibition Work ?* Cf. also *Annual Reports, U.S. Civil Service Commission*.

The great administrators have recognized the need of making their colleagues and subordinates in their own image, by embodying the results of their own inspiration in rules, and of adapting rewards and punishments to the incitement of those whose natures are unprompted by a native and undying flame.

Every activity requires its special technique, and the success of the administrator depends upon its possession. To secure the success of State activity the same rule must be followed as in any other individual or social activity, officials who have the necessary technique or the capacity to acquire it must be appointed. It would not be necessary to insist upon this quite simple truth if it were not that the generality of mankind talk as if they believe that government is exempted from submission to this rule, and as if rulers had not for centuries long attempted to get along with friends, relations, kinsmen, co-religionists, or class comrades, instead, simply, of the able. (2) It must acquire the appropriate apparatus to overcome distance, time, force and gravity—it must climb mountains, cross seas, receive and send messages, overtake runaway offenders, instal natural-science laboratories, telephones, guns and armies. (3) The State must properly dispose its officers, and distribute its powers territorially, at the centre and the extremities.<sup>1</sup> Moreover, this machine must be properly adjusted to the organs of public opinion and law-making, in order that they shall propel and control it, and that it shall be able to serve them with technical skill. The organization of public opinion and legislation themselves need to be delicately responsive, and wise, and zealous. The appropriate form of administrative arrangements for each activity, and their relationship to the other parts of a system, require exceedingly subtle judgment for success. For example, shall the State merely assist social and individual agencies when called upon, or are complete State ownership and management better? Between these extremes lie many phases: control by price-fixing (the New York telephones), control upon complaint of the public (municipal monopolies), control by inspection (pure food and drugs), control by irremovable administrative commissioners (the American control of Trusts), responsibility to parliaments (like the British Post Office), State ownership and license with semi-autonomous management (the British Broadcasting Company), semi-private, semi-public ownership with joint management (some German municipal enterprises)—the varieties are infinite, the modern world gropes towards proper solutions.

<sup>1</sup> E.g. Cf. the relationship in English Public Health, between the Ministry of Health, the county authorities, and the boroughs and districts. See Newsholme, *The Ministry of Health, Second Report of the Royal Commission on Local Government*, 1929; and *Local Government Act*, 1929.

Finally, when all this is at hand, there is still this possible defect in the perfect scheme, that where all-inclusiveness is an essential condition of success, the State will not be able to treat every case upon its individual merits, making allowances for idiosyncrasies, aberrations, and abnormality, but by one rule, which, though it elevates the nature of the sub-normal, incidentally wounds the feelings and depreciates the morality of citizens of average or more than average standard.<sup>1</sup> For though size is essential to success, and yields great benefits, it has inherent possibilities of occasional maladministration. Yet, in the end, even this may be avoided by a machine of the appropriate complexity and sensitiveness.

## XI

Still there may be unexpected and unwanted effects of State activity, due to the imperfect prescience of mankind, so that its relative value may be much less than its immediate face value because it is being bought with costs, which though not immediately visible are nevertheless expensive in the long run. For example, the imposition of uniformity of religious behaviour in Spain through the Inquisition contributed to Spain's economic impoverishment, loss of world status and the stifling of scientific development. The mercantile system helped to impoverish and disaffect Ireland in the British Commonwealth, and partly caused the American Secession. The Prohibition Laws in the U.S.A. are put into execution at the cost of the creation of habits of violence and disrespect for law and majority rule. Social welfare administered by the State and paid for from taxation may sap individual enterprise and thrift. These large problems always lie in the background of State activity, and ought to be counted in among its conditions.

<sup>1</sup> So, e.g., in Poor Relief, in Public Health Administration, and in the enforcement of factory regulations. It is clear that the need for alcoholic liquors is, among men and women, exceedingly various; to some it is a food, to others a poison, moreover different temperaments need it differently and are variously capable of self-control. Yet the State imposes a general rule and reduces all to the level of the least capable of self-government. Cf. Humboldt, *Über Wesen und Zweck des Staats*: 'The care of the State for the positive well-being of the citizen is further harmful because it must be applied to a mixed mass, and therefore it harms the individual by measures which fit him only with appreciable error.'

## **PART III**

### **THE ELEMENTS OF ORGANIZATION**

**CHAPTER V. FORMS OF GOVERNMENT, ESPECIALLY DEMOCRACY**

**CHAPTER VI. THE SEPARATION OF POWERS: FALSE AND TRUE**

**CHAPTER VII. CONSTITUTIONS (THE INSTITUTIONAL FABRIC OF  
THE STATE)**

**CHAPTER VIII. THE CENTRAL-LOCAL TERRITORIAL FABRIC OF  
THE STATE (FEDERALISM)**

**CHAPTER IX. FEDERALISM, INSTITUTIONS, AND IDEAS**

**CHAPTER X. FEDERALISM IN GERMANY SINCE 1918**



‘ Yet this objection which the men of democracies make to forms is the very thing which renders forms so useful to freedom ; for their chief merit is to serve as a barrier between the strong and the weak, the ruler and the people, to retard the one, and give the other time to look about him. Forms become more necessary in proportion as the government becomes more active and more powerful, whilst private persons are becoming more indolent and more feeble.’—DE TOCQUEVILLE.

‘ When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism ; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.’—JUSTICE HOLMES in *Missouri v. Holland*.

## CHAPTER V

### FORMS OF GOVERNMENT, ESPECIALLY DEMOCRACY

WE have seen that the State may be expressed in many activities and operate in many diverse forms; and also that the success of the activity depends upon the appropriateness of the mechanism to the purposes sought. In the countries which concern us the social power-relationship has embodied itself in a general form of the state called Democracy. But this term, literally, conveys no more than the idea that government is, or ought to be, carried on by the People. Democracy has come to mean so many different things, some very hostile to each other, that the word needs careful analysis if misunderstanding and idle controversies are to be avoided, and if the possible, and quite legitimate differences of connotation, and its very varied institutional arrangements are to be revealed. We intend only to deal with the subject generally and briefly, for the particulars are considered in subsequent chapters; and some, indeed, we have already casually described.

Political science has, since the earliest times, occupied itself with attempts to classify the Forms of Government, but to little purpose. For the facts to be classified were too many and too diversely combined to allow of a few simple and informative categories. Thinkers have, indeed, been sorely exercised by a difficulty which leaps to the eye: are we to classify upon the basis of the *legal* residence of authority, or upon our judgement of the *actual* sources of power; and, whatever our decision, are we to qualify our classification by consideration of the actual manner, the purpose and the temper of the governors? For example, is an intolerant exercise of power by the majority democratic government? Such a difficulty already assailed Aristotle, for he thought it insufficient to say simply that the forms of government were three, monarchy, aristocracy, and the city or polity: he felt that he must go on to say that monarchy is tyranny, aristocracy, oligarchy, and the city, a democracy, when the purpose, instead of being the benefit of the whole community, is that of the individual, or the few, or the many, respectively. Hobbes thought this improper and wished to exclude the question of purpose and temper from the

definition.<sup>1</sup> That difficulty has dogged political science throughout the centuries, and there are many to-day who urge that Rousseau, the great prophet of the sovereignty of the people, is no democrat because there were no limits to the associated authority of this democracy over the individual.<sup>2</sup>

We need not insist upon a satisfactory classification. It is enough if we know that such have been attempted and that they are not of much value owing to the different personal prejudices which have gone to their construction.<sup>3</sup> Enough, also, if we remember that no Monarchy or Dictatorship has been allowed to govern, excepting *de facto*, for the shortest span of time (until some, or the majority, of the citizens have discovered the threat to their interests or beliefs) without the co-operation, control, or passive consent of the few rich or able or of the many poor.<sup>4</sup> Enough, again, if we recognize that the *purpose* of the governors and the consequences of their rule have ever been of the essence of the definition and title of the form of government, that its mere machinery, ruled by one, or an aristocratic council, or by all, had hardly ever been considered enough to deserve the name.<sup>5</sup>

**Democracy as a Doctrine of Protest.** Accordingly, democrats are united in one thing, but divided in most others. They were and are united in a negation; that is, in their antagonism to arbitrary government by a monarch or a very few. Positive proposals, however, find them widely divided; for some desire no government at all,<sup>6</sup> while the bulk, who admit the necessity of some degree of government, offer a large variety of solutions and patterns from the Whig ideal of a balance of authority and power between Kings and Lords and Middle Classes, or the German *Rechtsstaat*, to the minutely distributed democracy of the Russian Soviet system.

<sup>1</sup> Cf. *Leviathan*, Chap. XIX: 'There be other names of Government, in the Histories, and books of Policy; as *Tyranny*, and *Oligarchy*: But they are not the names of other Formes of Government, but of the same Formes misliked. . . .'

<sup>2</sup> Hasbach, *Die Moderne Demokratie* (Jena, 1921), p. 30.

<sup>3</sup> Jellinek, *Allgemeine Staatslehre*, gives a list of forms to show the effect of the subjective outlook (p. 662 footnote): Despotism, theocracy, the just state; republics, autocracies, despotisms; organic and mechanical states among the former, nomad and agricultural states among the latter, monarchies, ideocracies, military rule, the rule of bankers; idol-states, individual-states, race-states, form-states, patriarchal states, theocracies, patrimonial states, states of antiquity, and the 'law-states' (*Rechtsstaat*) of to-day; monocracies (monarchies and monocratic republics) and plenocracies (plenoarchies and plenocratic republics); monarchy to democracy, aristocratic and democratic; autocracies, timocracies, pure democracies, cultural democracies, and mixed forms; hereditary government and free states; police and law-states; centralized states, self-government states, states based on provincial and municipal autonomy; homoglot and polyglot territorial, national and multinational states, etc.

<sup>4</sup> Cf. Hume, *Essays* (ed. London, 1875), Vol. I, Part I, Essay IV; Dicey, *The Relations between Law and Public Opinion in England* (1905), Lecture I.

<sup>5</sup> Cf. Bryce, *Modern Democracies*, I, 176. De Tocqueville defines the form of government by reference to its temper; Montesquieu also defines by temper as well as by machinery. Cf. *Esprit des Lois*, trans. by Reeve (London, 1878), I.

<sup>6</sup> Cf. Kropotkin, *Mutual Aid* (1904).

The truth is that European monarchy was attacked and overcome by hosts who kept a rendezvous with different motives and aspirations. The task accomplished, the original interests continued to assert themselves, others arose by the way, and the machinery of each new government was cast in a mould fashioned by the peculiar and complex forces of those interests. These interests were different; they are different; and they continue to differ; and since this is so, democratic institutions, hopes, and principles of criticism, are necessarily of many kinds, so that democrats sometimes seem to each other either stupid or malevolent.<sup>1</sup> *Yet all are right*, granted their spiritual point of departure; and we must examine the phases of that process which has its end in democratic institutions and the democratic temper; we must find the ultimate spiritual values sought by democrats, the concrete social and economic changes demanded in the name of democracy and the resultant machinery of government.<sup>2</sup>

**Liberty as an Ideal versus other Ideals.** For the sake of convenient exposition, as also because the division corresponds broadly to the facts, I divide democrats into those who seek Liberty as the main end of government, and those who seek other ideals, like Equality, which have seemed to require the democratic form to produce them. If we follow out the meaning of these ideals from their origin, we shall find that quite different forms of government result from each. The ideal of liberal democracy is expressed in a variety of familiar phrases, such as 'Just Government is government by consent of the governed', or 'Self-government', and it implies, in the works of various authors, the subjection of government to popular control, the limitation of the sphere of government, and the universal possibility of active participation in the process of government. Essentially what is sought is, for its own sake, the possibility of unhindered initiative and self-developing enterprise, and an element, more or less large, but self-determining, of *dissociation*<sup>3</sup> from the groups who make and control the State: a No-State Land. In proportion as men have wanted this, for itself, and its unbounded inherent possibilities, they have insisted on those institutions, and those alone, which offer the measure of that liberty,

<sup>1</sup> For example, in the controversies regarding Proportional Representation and in the controversies between the Bolsheviks and the milder schools of socialism. Cf. Trotsky, *Where is Britain Going?*, London, 1926.

<sup>2</sup> This is never easy, and sometimes it is impossible. For the psychological state of democratic reformers is not often elaborately expressed, and even then is not a deliberate exercise of the scientific will, but is poured forth in the heat of a campaign with all the exaggerations of rhetoric, or the compromises of practical politics, or, if it is the work of people like Locke, Harrington, Rousseau, Kant, Sidney and Beatrice Webb, or Duguit, ingenuity meanders far from the region of the possible, and becomes an exercise in itself, delighting the mind, soothing thwarted passions, or gratifying generous impulses. Hence also, much vagueness in democratic assumptions, and in the critical judgment of institutions shown, for example, in such modern slogans as 'The Crisis of Democracy', and the 'Decline of Parliaments'.

<sup>3</sup> Cf. Faguet, *La Politique Comparée de Montesquieu, Rousseau et Voltaire*.

and their central purpose has been to contrive limits to governmental action. They were not insistent upon universal franchise, provided there were a large enough measure of popular control to make government responsible; they did not press for *direct*, but only for representative government; and it was enough if representatives were but generally and not minutely bound to follow their constituents.

Yet this ideal was never held for long by any man or class without other aspirations crossing it, which decelerated and deflected its original urge. Humanitarian feeling, patriotism, loyalty to one's social circle, shaped and limited the expression of the ideal, so that to the middle classes of the nineteenth century it was enough if such liberty were theirs and not the labourers', while in Russia to-day, such liberty is conceived as proper for producers, but not for the middle-class business-man of the old régime.<sup>1</sup> In other words, the ideal was not and never is quite disinterested. It has been evolved, and is still in evolution, under the pressure of one class after another, each of which reinforces the assault upon sovereign power. Those who have been utterly convinced of the supreme value of liberty have been ready to take grave risks on its account; like Kant<sup>2</sup> and Herbert Spencer they have contemplated the prospect of misery and death, in the faith that human perfection would ultimately result. For what might come upon that upward path, oppression, social inequality, generations of human cruelty, they had small regard; they looked to the end, and believed that it would be so good that the rest must be stoically accepted. Such thinkers necessarily conflict with others who seek some such immediate good as economic equality.

**Passion in Government.** Liberty, in short, is claimed by some on its own account, while to others it is a means to some other end. The end determines the means, and the end has not always been such as to produce democratic or freer institutions in the sense we have already assigned to them. The service of God in Calvin's sense, for example, required freedom of the Church from the commands of the State, and was, therefore, in a sense democratic; it also required democracy within the Church. Yet so passionate a conviction was expressed in the importance of deeds, and obedience to God, that government was supremely necessary to enforce them, and the civil authority was required to be very severe in its support of a comprehensive theocratic regimentation of transgressors.<sup>3</sup> Not only at Geneva but in Boston, these very postulates formed the basis of veritable tyrannies, though the rulers, like John Cotton, governed for the good of the people. Calvinism gave birth to theocracy, the rule

<sup>1</sup> Timaschew, *Staatsrecht Sowjetrusslands*, and Mirkiné Guetzévitch, *Théorie générale de l'état soviétique* (1928).

<sup>2</sup> *Principles of Politics*, ed. and trans. by W. Hastie, Edinburgh, 1891, Essay I, *The Natural Principle of the Political Order*.

<sup>3</sup> Choisy, *La Théocratie à Genève au temps de Calvin* (Geneva, 1897).

of the godly, and not to democracy, which came later with the tide of revolutionary feeling against Britain. For, ultimately, the Old Testament taught that only the elect are saved, and the rest are damned; it inverted the order which really urges men to demand freedom, for it asserted predetermination and therefore excluded perfectibility, and if men are slaves of the Supreme Will and not masters of their own fate, what basis remains for a doctrine of political self-determination? Again, the ultimate moving force of Rousseau's faith was hatred of oppression, and therefore of economic inequality, and thus the belief that to secure harmonious, unoppressive and 'natural' civilization economic equality was essential.<sup>1</sup> His democracy was made for this purpose, but to level men requires a mighty force, and this clearly threatens his freedom. Hence Rousseau's institutions culminated in the unqualified rule of the majority, with a perfect, unlimited sovereignty,<sup>2</sup> carried out by representatives who were strictly accountable mandatories of the people, and intolerant of any gospel which conflicted with the end of the State as declared by the majority. Equality may be the result, but the liberty sought by Humboldt, Kant, Jefferson, De Tocqueville and Mill is abolished, unless men should, from that very equality, once more learn liberty's allurements.<sup>3</sup>

**Patience and Impatience in Government.** We have arrived at the essence of the differences among those who say they hold the democratic faith, and who yet diverge at once when they propose or actually establish their institutions. The essence of the difference lies in two things: (1) the compatibility of the interests pursued with government by consent of all, and (2) the patience and toleration of those who govern (and let us always think not in terms of the Government, but in terms of the individuals and groups who ultimately govern). The nature of the end of government may be such as to exclude such corollaries of the ideal of liberty as a limited sphere of government, freedom of opinion, and meeting, and association, and dependence of government upon universal suffrage. These

<sup>1</sup> Cf. Faguet, *op. cit.*, p. 94 ff.; E. H. Wright, *The Meaning of Rousseau*, London, 1929.

<sup>2</sup> I am willing to allow that Rousseau was uncertain of this; but I would urge that the uncertainty arose from desire to have the best both of the world of equality and the world of freedom, without the surrender of the necessary hostages. Generous and emotional people often talk and write in this way: they are much more generous than Nature.

<sup>3</sup> Similarly with the march of Bolshevism. It began with the cry 'all power to the Soviets!' but so urgent was it to arrive at its social and economic destination, so compelling was the vision of that City, that a concept of leadership and a proletarian vanguard was added, to lead, nay, to compel, the amorphous masses to tread the way. The legal authority of the Soviets was extinguished by the activities of the Communist Party. Thus also has Mr. Shaw travelled from Fabian Democracy to the concept of Kingship, while his more patient friend urges the 'inevitability of gradualness'.

may not be altogether excluded : they may be qualified in various degrees ; thus when intoxicating liquors are prohibited liberty is partially extinguished ; no tuberculosis or diphtheria ' contact ', perfectly detected, can legally avoid quarantine ; the parliamentary system can only be maintained if members limit their powers of invective and denunciation. In fact, examination of the tenets of various groups and classes who have demanded democracy reveals that their notion is largely (not wholly) the product of their interests ; they are willing to go to the margin needed to satisfy these and no further.<sup>1</sup> So much freedom, and freedom for such and such groups : beyond that, arguments are discovered to prove the unfitness of others to govern.

Further, and this seems to be the cause of modern anxiety regarding democracy, the governors or would-be governors, or social philosophers, urgently, passionately, immediately demand vast reforms, and the inevitable result is to override the very things which democratic theorists, who regarded liberty as their principal purpose, have held to be the essence of the democratic faith, namely, government by discussion (that is, persuasion of the governed) and gradual concessions by the governing groups to the governed, with toleration for minorities, localities and the individual, and a tender regard for conscience and property.

Modern States are actually faced by this formidable task : to secure speedily, and thereafter to maintain, a number of reforms in the direction of greater economic and social equality, while excluding coercion, and certainly bloodshed, and while maintaining democratic institutions. There is the stress and strain. But let us consider briefly how democracy arose in the modern State and what institutions were demanded in its name.

**The Social Contract.** Its roots lie in the Protestant Reformation of the sixteenth century, in the New Learning begun in Italy, in economic changes and geographical discoveries. The New Learning awakened the critical spirit by offering men the political models of classical antiquity with which to compare and condemn their own system, while scientific discoveries, if they did not yet make the old cosmogony and its religious superstructures quite untenable, at least raised doubts.<sup>2</sup> Economic changes caused partly by catastrophes, and partly by new agricultural and commercial pursuits, changed the balance of property. Geographical discoveries brought knowledge

<sup>1</sup> For example in France before the Revolution of 1848—the ' pays legal '. Cf. Lowes Dickinson, *Revolution and Reaction in Modern France*, 2nd Ed., London, 1927, p. 116 ; Lavissee, *Histoire de France Contemporaine*, Vol. V, Bk. V, pp. 344-8 ; Barthélemy, *L'Organisation du Suffrage* ; Seymour, *Electoral Reform in England and Wales*, New Haven, 1915.

<sup>2</sup> Cf. Burckhardt, *The Renaissance in Italy* ; Pator, *Studies in the History of the Renaissance* ; H. O. Taylor, *Thought and Expression in the Sixteenth Century* (1920) ; Lecky, *History of the Rise and Influence of Rationalism in Europe*.

(or legends) of other civilizations, offered new outlets for adventurous energy, and set men marvelling and thinking. The old certitude—incorporated in religious and social myths and popular ways, and thence subservient to government—was gone. Europe was dowered with Bibles in a tongue which the crowd could understand, and men like Luther and Calvin thundered not only at ancient religious institutions, which were then almost indistinguishable from the other arm of society, Kings and Princes, but at *beliefs*.

The political essence of the Reformation was, on Luther's side, the equal worth of all Christians (not 'all men'), the unique value of their individual consciences and the freedom of the religious conscience and behaviour from the dictates of the secular Prince,<sup>1</sup> while Calvin reinforced the doctrines of the priesthood of the laity, and went some way towards government of the Church and of the State (which in Geneva was only another aspect of the Church) by a representative council of the more considerable of the citizens, and recurred again and again to the theme of men united with each other and with God by a covenant. Here were all the materials of democracy: government by the people, because each believer was 'spiritually lord of all'<sup>2</sup> and 'faith is a voluntary matter which cannot be forced'<sup>3</sup> by any one else, for 'neither Pope nor Bishop nor any man has a right to dictate even a syllable to the Christian without his own consent',<sup>4</sup> and *for* the people (but in a Christian way), for 'we may not become the servants of men'.<sup>5</sup> And what was the quintessence of the freedom of Christian men, the spiritual value behind all? It was the uncompromising, absolute conviction, that since only the individual person can discover the meaning of existence he ought to be free to live it, for his 'inward sense of judging concerning doctrine, is a sense which, though it cannot be proved, is nevertheless absolutely certain'.<sup>6</sup> I should rather say that precisely *because* it cannot be ultimately proved or disproved in any one, or by any one, it is accepted by the democrat to be as certain as any other person's 'inward sense of judging'.<sup>7</sup>

**The Democratic Temper.** This attitude may have either of two results according to the temper of the person: absolute certainty may lead to an attempt to impose it upon others, or it may lead to readiness to accept another's truth to be as good as his own, and

<sup>1</sup> Cf. Mackinnon, *Luther and the Reformation*, 4 vols. (1927-30). I do not forget Luther's part in the peasants' rising, or his hostility to the anabaptists. He discriminated; but the people did not.

<sup>2</sup> Luther, *On the Freedom of a Christian Man*.

<sup>3</sup> Luther, *On the Secular Power: How far obedience is due to it*.

<sup>4</sup> Luther, *A Prelude on the Babylonian Captivity of the Church*.

<sup>5</sup> *Ibid.*

<sup>6</sup> *On the Freedom of a Christian Man*.

<sup>7</sup> On the political theories of Calvinists, see *American Historical Review*, XXI, 481-503.



therefore to enter into community, so far as it is possible, to secure a reconciliation. The Certain have, in the flame of righteous indignation, created marvellous things, and they have broken states into bloody fragments (for example, in the American Civil War and the Russian Revolution of 1917) and violently and remorselessly taken life; the Patient have maintained peace, harmony and unity, but in doing so they have annihilated incongruous (perhaps creative) emotions, beliefs, hopes. The one has caused battles between men; the second battles of will within them. One may eradicate more than it intends, the other may kill, by its gradualness, the things whose survival and development it desires. This contrast of temper always arises, even on the rare occasions, when men are unanimous as to their destination. Thus the democratic form of government—the simple idea of government by the people—is expressible in many different and complex ways. Let us remember, too, that the realization that life is short may have, broadly, one of two effects, according to the temperament: it may make men so impatient for reform and advancement that they even include assassination in their policy; it may cause resignation and a patient contemplative pity for the race of men and women condemned, alas, so soon to perish.

Perhaps the best illustration of the difference of temper is to be found in the constitutional conflict of the seventeenth century in Britain. That began as a religious conflict between nonconformist sects and the Crown as the head of the Church of England, but gradually there entered into that conflict considerations of taxation and property which sharpened the desire for control of the Executive, and ultimately, the people who lent force to the claims of the parliamentary leaders, began to demand power for the common people. Though all professed much the same religion, and were brothers in arms to maintain the covenant of God, as soon as the question of the distribution of political power was raised, those who now represented the established and well-off order—the middle- and upper-class landowners—were quick to detect and rebut the implications of complete democracy. The classic discussion of 1647 between Ireton and Cromwell and the representatives of the common soldiers of the army—the Levellers—reveals the effect upon democratic institutions of different tempers and aspirations. Broadly speaking, the soldiers (represented by John Wildman and Colonel Rainborow) maintained that the battle was 'not to be enslaved'; Ireton that it was 'against despotism', and Cromwell that it was for the 'equality of consciences'. The difference between the first and the latter two is vital, for the first meant abolition of enslavement of *all kinds*, political and economic, while Ireton's demand was consistent with the mere establishment of safeguards which would certainly redound to the religious advantage of everybody, but would redound more to the economic advantage of the well-

off than of the poor. Cromwell's formula was certainly a sound answer to royal pretensions, and would make for some popular participation in government, but, if consciences were equal, then those who possessed had an equal right to continue in possession, and the poor had not a better right to dispossess them.

The soldiers attempted, as almost all radical democrats have done, and, indeed, as almost all rebellious people, even the rich and powerful do, to avoid the argument from the social consequences, and to insist only upon the argument from natural right, that is from the assumption that civil institutions did not yet exist, and that a primal sense of justice was consciously a political constitution for society. This way led to universal suffrage in the interests of the people.<sup>1</sup>

To this, Ireton replied, fundamentally, that he meant to enjoy his own property and to safeguard the institution in general. To this end only those with some property—a forty-shilling freehold, for example, not being domestics or servants of others, should be permitted to vote, for these alone could have an independent political opinion<sup>2</sup> and a permanent 'interest'<sup>3</sup> in the country's welfare. But, to him, a kind of liberty was paramount even to property—'a peaceable spirit which is suitable to the Gospell', a 'Kingdom wherein I may live in godliness, and honesty, and peace and quietnesse'. For these things he would yield his property, if all others desired it.

The ultimate issue then was this: should we move all at once from one constitution to another, on the passionate convictions of some men, or remain under the old state on the equally passionate convictions of others? Where was the spirit of God? With the former or the latter? There was suffering either way if it were entered upon without regard for the other; for the first must cause the disruption of society as it was, and the second the continued misery of the poor.

The solution is, that *if national existence, the continuance of the sense of political community, is desired*, the temper of both parties must be qualified by the recognition that the truth does not rest with either party, but in all together. God, Truth or the Ultimate Good, is dis-

<sup>1</sup> 'Instead of following the first proposition to enquire what is just, I conceive we looke to propheties, and looke to what may be the event, and judge of the justnesse of a thinge by the consequence.' \* . . . 'Wee are now engaged for our freedom; that's the end of Parliament, nott to constitute what is already according to the just rules of Government. Every person in England hath as cleere a right to elect his representative as the greatest person in England. I conceive that's the undeniable maxime of Government: that all government is in the free consent of the people. If so, then uppon that account, there is noe person that is under a just Government, or hath justly his owne, unlesse hee by his owne free consent bee put under that government. This hee cannot bee unless hee bee consenting to itt, and therefore according to this maxime there is never a person in England (but ought to have a voice in elections).'

<sup>2</sup> *Ibid.*, p. 34.

<sup>3</sup> *Ibid.*, pp. 306-8, 324.

\* Wildman, in *Clarke Papers*, p. 317.

coverable only in the assemblage of unique qualities in all persons. There is the ultimate axiom of the democratic system: for, if the temper or the intellect of self-governing individuals is permitted to work unhindered by conscious regard for, or partnership with others, since men are different, conflict, perhaps breakdown, is inevitable.

Both Ireton and Cromwell, not uninfluenced, I think, by their social and economic position, urged this theory. Ireton said: 'I thinke every Christian ought to beare that spirit in him, that he will nott make a publike disturbance uppon a private prejudice'.<sup>1</sup> Cromwell constantly intervened in debate to urge the cultivation of 'a uniting spirit',<sup>2</sup> and when matters reached a point when it was decided that an adjournment for prayer might result in the return of the delegates with a fresh and more conciliatory idea of God's will, Cromwell asked 'that they should nott meete as two contrary parties, butt as some desirous to satisfie or convince each other'. That, experience has since taught, is the essential principle of democratic government by the party system. Cromwell pierces even further into the psychology of practicable democracy. True it is that God may speak through any man, high or low: 'I know a man may answer all difficulties with faith, and faith will answer all difficulties really where it is.' Yet there must be pause, for 'we are very apt all of us to call that faith which perhaps may be but carnal imagination and carnall reasonings'.<sup>3</sup> Difficulties must be considered. If any one is at liberty to produce his scheme of a constitution founded upon natural right, 'and not onely another, and another, butt many of this kinde, and if soe, what doe you think the consequence of that would bee? Would it not bee confusion? Would itt nott be utter confusion?'<sup>4</sup>

More, who knows God but all? Not *each*, let the term be marked, but all!

'So confesse itt is our high duty, (to waite uppon God, and hearken to the voice of God speaking in any of us) butt when anything is spoken as from God, I thinke the rule is, Lett the rest judge! Itt is left to mee to judge for my owne satisfaction, and the satisfaction of others, whether itt be of the Lord or nott, and I doe noe more. I doe nott judge conclusively, negatively, that itt was not of the Lord, butt I do desire to submitt itt to all your judgements whether itt was of the Lord or noe?'<sup>5</sup> . . . 'If in those thinges wee doe speake, and pretende to speake from God, there bee mistakes of fact—if there bee a mistake in the thinge, in the reason of the thinge—truly I think itt is free for me to show both the one, and the other if I can. *Nay, I think itt is my duty to doo itt: for noo man receives anything in the name of the Lord further than (to) the light of his conscience appeares.*'<sup>6</sup>

<sup>1</sup> *Clarke Papers*, p. 324.

<sup>2</sup> *Ibid.*, p. 250.

<sup>3</sup> *Ibid.*, p. 238. Cf. a similar train of reasoning in Junius Brutus, *Vindiciae contra Tyrannos* (Hist. Introd., by H. J. Laski), London, 1924, p. 112.

<sup>4</sup> *Clarke Papers*, p. 237.

<sup>5</sup> Firth, *Clarke Papers*, p. 375 footnote d, cites 1 Corinthians xiv. 29.

<sup>6</sup> *Ibid.*, p. 376.

No ! though we must watch for the manifestation of God in ourselves—and God is that which must move the conscience after earnest rational consideration <sup>1</sup>—we must beware lest we act precipitately. ‘I would wee should all take heede of mentioning our owne thought and conceptions with that which is of God.’<sup>2</sup>

These two things are needful: a tolerant watchfulness for the godliness in others, mixed with a strict interrogation of what wells up from our own inwardness; and a disposition to live peaceably together. That is, a readiness to create and utter the result of our creation—no passivity—and also a censorship of our own and other men’s conceptions; and further, no temper of disunion.<sup>3</sup>

Yet all men optimistically believe that their perception of God, or the Good, or of Justice, or the Best Self is a satisfactory dispensation for all. Wildman was as sure as Cromwell, and Lenin as Karl Kautsky. And, thus, Cromwell asserts that God is not the author of contradictions; that these are more as to means than ends.

Even these optimistic beliefs, however, are proven wrong by daily experience, and democratic institutions become properly a compromise, with considerable conflict and suffering, between them all; for however sternly we restrain the impulses in us, which we call God, some of it will out—as in Cromwell’s theses—in its own pristine character. The full impulse of the democratic temper might disrupt society; and to the extent that peace is desired, men produce liberalism by reducing democracy. This purpose has had to come about by the creation of institutions of restraint because men have not yet learnt enough, or deliberately do not choose, to set up the restraints within themselves. Democracy might operate perfectly if the condition laid down by Cromwell for satisfactory discussion were present:

‘that wee may all of us soe demeanse ourselves in this businesse that wee speake those thinges that tend to the uniting of us, and that we none of us exercise our parts to straine thinges, and to lett thinges to a longe dispute, or to unnecessary contradictions, or to the stirring uppe of any such seede of dissatisfaction in one another’s mindes as may in the least render us unsatisfied one in another. I doe not speake this that anybody does doe itt, butt I say this ought to *become*, both you and mee, that we soe speake and act as that the end may be unison and a right understanding one with another.’<sup>4</sup>

In proportion as this spirit does not exist, in proportion as it cannot exist owing to uncontrollable impulses in man’s thought and behaviour,

<sup>1</sup> Hegel’s doctrine is similar.

<sup>2</sup> *Clarke Papers*, p. 378.

<sup>3</sup> Cf. the Chapter on Parliamentary Deliberation, *infra*. *Clarke Papers*, p. 379: ‘If, when we want particular and extraordinary impressions, wee shall either altogether sitt still because wee have them nott, and nott follow that light that wee have: or shall goe against, or short of that light that we have, upon the imaginary apprehension of such divine impressions and divine discoveries in particular thinges—which are not divine as to carry their evidence with them to the conviction of those that have the spirit of God within them—I think wee shall be justly under a conde nation.’

<sup>4</sup> *Ibid.*, p. 201.

a democratic form of government cannot but be turbulent, intolerant, violent.<sup>1</sup> The less passionate, wilful, and fanatical reformers have recognized this, and have in the last 200 years postulated certain institutions to act as restraints until the time shall come—if ever it does—when by some means individual self-control shall be a sufficient guarantee of social creativeness and the satisfaction of appetites and interests, by the method of peaceful discussion.<sup>2</sup>

We now indicate briefly the fundamental spiritual impulses towards democratic government, the groups of people interested in this form of government, and the various devices suggested as proper to it.

**The Spiritual Impulses.** We have already spoken of the changes in the fifteenth and sixteenth centuries contributing to a movement of revolt against authority, and to an assertion of individuality. It is interesting to search out what it was believed this liberty would produce, and we may do it by exploring the works of those who have contributed to the democratic tradition. Two things, to begin with, are clear, that the great theorists took certain claims for granted, not seeking to justify them, perhaps because they were considered sufficiently ultimate as values to be impossible of justification. The spirit of this, I think, is rather what one finds in such a passage from John Locke's *Civil Government*: 'Since a rational creature cannot be supposed, when free, to put himself into subjection to another for his own harm. . . .'<sup>3</sup> Consequently, only a bald statement, without psychological analysis, is made.

Secondly, the values were stated by people who, as a rule, were not in authority, but fighting against it, and therefore obliged to discover or invent some rule to justify their revolt and their positive claims. Or they were people who had acquired authority so recently, and usually by battle, that they still had to continue to encourage themselves and their followers. Once the battle for democracy was, substantially, won, as by the 'thirties of the nineteenth century, even those—I might say, especially those—who were already in possession of its benefits, and whose social predecessors battled in original terms, became, as it were, revisionists: that is, finding, like De Tocqueville, that liberty had not come with democracy but was actually threatened by it, they claimed safeguards against the product they had conjured up—impediments to produce *liberal* democracy. Thus, not all the views we shall presently read led necessarily to government of the

<sup>1</sup> Cf. Harrington, *The Commonwealth of Oceana* (Edn. 1887), p. 67: 'To the commonwealthsman I have no more to say, but that if he excludes any party, he is not truly such; nor shall ever found a commonwealth upon the natural principle of the same, which is justice . . .', etc.

<sup>2</sup> Ireton, as in Gooch, *English Democratic Ideas in the Seventeenth Century* (Edn. 1927), pp. 139, 140.

<sup>3</sup> *On Civil Government*, Bk. II, par. 164.

people by the people for the people: to that they led only when the grouping of society, the character of its activities and its temper, were propitious.

Almost all felt resentment against Tyranny. Some, like La Boétie, were sensitive to the cowardice of people who lived under it,<sup>1</sup> and compared their degradation to that of beasts.<sup>2</sup> Others, like Milton, inveighed against the results of a tyrant's power, terrible because it was 'boundless and exorbitant'.<sup>3</sup> Paine said that the principle of Kingship caused man to become the enemy of man since royal ambitions incensed them to hostilities.<sup>4</sup> There was the ultimate unwillingness to be sacrificed unless for reasons which satisfy: 'I am against the King or any power that would destroy God's people, and I will never bee destroyed till I cannot helpe myself. Is itt nott an argument, if a pylott run his shippe uppon a rock, or if a Generall mount his cannon against his army, hee is to bee resisted?'<sup>5</sup> Could any one person be relied upon, asked Junius Brutus, to safeguard another's life and welfare? Any one man was too mutable, too unruly and weak against his passions to be so trusted.<sup>6</sup>

Another, and a more powerful tendency, was the denial that any one person or arbitrary grouping could be so certain of the righteousness of its values, that control over their government was unnecessary. This tendency began with Lutheran doctrines and found its way, as a crude and non-rationalized enthusiasm, into the sermons and tenets of the new nonconformist sects. They spoke of 'conscience', 'grace', and the 'light of nature' which informed individuals and gave them a sovereign validity. But in the hands of men like Cromwell, Locke and Milton, and afterwards of Paine, Humboldt and J. S. Mill,

<sup>1</sup> *Discours de la Servitude Volontaire* (Ed. Bonnefon), p. 57.

<sup>2</sup> *Ibid.*, p. 81.

<sup>3</sup> *Prose Works* (Edn., London, 1900), Vol. II, *The Tenure of Kings and Magistrates*, p. 18.

<sup>4</sup> *Rights of Man*, ed. by H. B. Bonner, London, 1913, p. 75. According to Hobbes (op. cit., p. 89): '... amongst men, there are very many, that thinke themselves wiser, and abler to govern the Publique, better than the rest; and these strive to reforme and innovate, one this way, another that way'...

<sup>5</sup> *Clarke Papers*, p. 273.

<sup>6</sup> Cf. Junius Brutus, op. cit., pp. 152, 153: 'There is no man so vain, who would willingly that his welfare should depend on another's pleasure. Nay, with much difficulty will any man trust his life in the hands of a friend or a brother, much less of a stranger, be he never so worthy. Seeing that envy, hate, rage, did so far transport Athamas and Ajax, beyond the bounds of reason, that the one killed his children, the other failing to effect his desire in the same kind against his friends and companions, turned his fury and murderous intent, and acted the same revenge upon himself. Now it being natural to every man to love himself and to seek the preservation of his own life, in what assurance, I pray you, would any man rest, to have a sword continually hanging over his head by a small thread, with the point towards him? Would any mirth or jollity relish in such a continual affright? Can you possibly make choice of a more slender thread, than to expose your life and welfare into the hands and power of a man so mutable, who changes with every puff of wind? Briefly, who almost a thousand times a day, shakes off the restraint of reason and discretion, and yields himself slave to his own unruly and disordered passions.' Cf. also pp. 185 ff.

the red-hot enthusiasms were moulded by circumspect reason into weapons less cumbrous, if at once more destructive of tyranny and constructive of liberty, in their fine logic. Cromwell, as we have seen, urged 'equality of consciences'. Locke averred that

'every church is orthodox to itself: to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereunto, it pronounces to be error.'<sup>1</sup>

But the quintessence of doubt, and therefore of the argument for freedom, toleration and democratic government is this, that men have not the faculties for perfect conviction regarding their ultimate beliefs:

'The articles of my religion, and of a great many other such shortsighted people as I am, are articles of faith, which we think there are so good grounds to believe, that we are persuaded to venture our eternal happiness on that belief: and hope to be of that number of whom our Saviour said, "Blessed are they that have not seen, and yet have believed".'<sup>2</sup>

According to Milton, the truth is as divided among all men, who had no ability but to see according to the peculiar fashion in which they had each been shaped.<sup>3</sup> 'Twenty capacities, how good soever' are insufficient to contain 'all the invention, the art, the wit, the grave and solid judgement' of England.<sup>4</sup> 'Neither is God appointed and confined, where and out of what place these his chosen shall be first heard to speak. . . .'<sup>5</sup>

Let us pass on, though we could quote similar passages from the other authors we have mentioned, excepting that these belonged to an age when God had been replaced by Nature or Man or Science

<sup>1</sup> *Letters on Toleration*: 'So that the controversy between churches about the truth of their doctrines, and the fruits of their worship, is on both sides equal; nor is there any judge, either at Constantinople, or elsewhere upon earth, by whose sentence it can be determined. . . . The decision of that question belongs only to the Supreme Judge of all men, to whom also alone belongs the punishment of the erroneous. . . . There is only one of these (the ways of the Churches) which is the true way to eternal happiness. But in this great variety of ways that men follow, it is still doubted which is the right one. Now neither the care of the commonwealth, nor the right of enacting laws, does discover the way that leads to heaven, more certainly to the magistrate, than every private man's search and study discover it unto himself. . . . If I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in against the dictate of my conscience will ever bring me to the mansions of the blessed. . . . Whatsoever may be doubtful in religion, yet this at least is certain, that no religion which I believe not to be true, can be either true or profitable to me.'

<sup>2</sup> P. 292: 'But we neither think that God requires, nor has given us faculties capable of knowing in this world several of those truths which are to be believed to salvation. For whatever may be known, besides matter of fact, is capable of demonstration; and when you have demonstrated to any one any point in religion, you shall have my consent to punish him if he do not assent to it.'

<sup>3</sup> *Areopagitica*, p. 66: 'God uses not to captivate under a perpetual childhood of prescription but trusts him with the gift of reason to be his own chooser. . . . He (God) left arbitrary the dieting and repasting of our minds; as wherein every mature man might learn to exercise his own leading capacity.'

<sup>4</sup> *Ibid.*, pp. 80, 81.

<sup>5</sup> *Ibid.*, p. 98.

as a political force, and when, accordingly, politics were no longer discussed in Biblical terms.<sup>1</sup>

The democratic tendency, however, moved not exclusively by resentment of tyranny and doubt of truth, it soared upon the wings of man's positive creativeness, and was impelled by the overwhelming consciousness of individual worth. All other things might be doubtful, but this was certain, that God or Nature had implanted the seeds of good in every one and meant that they should freely bear their proper fruit. Evidence? Let each one search his soul and apprehend the message of his feelings; or cast the mind back to a time when government did not yet exist; or reason a little. There was evidence enough. And, in truth, if that evidence did not suffice, let those who believed otherwise, supporting tyrants, find a sufficient rebuttal; for no one could have been stupid enough to have desired the government under which they groaned. Thus La Boétie:

'All sensate things, as soon as they possess consciousness, feel the evil of subjection and run after liberty . . . what accident was that which was able to denature man, the only being born, really, to live in freedom, and to make him lose the memory of his original being and the desire to regain it?'<sup>2</sup>

<sup>1</sup> For religious feeling is indestructible: only the objects of worship are different: and behind all lies the mystery which human faculties cannot understand; and hence, for most men, the essence, if not the verbal vesture, of the arguments of Locke and Milton, are of abiding validity.

<sup>2</sup> Op. cit., p. 64. Junius Brutus said that: 'First, the law of nature teaches us and commands us to maintain and guard our lives and liberties, without which life is scant worth the enjoying against all injury and violence' \* and refuses to believe that men 'by nature loving liberty, and hating servitude, born rather to command, than obey', and 'ordinarily hating or at least envying their superiors', would admit being governed, were it not for 'some special and great profit'. † Mariana taught, in an interest as opposite as the poles from Junius Brutus, an original individualism in a State of Nature. ‡ Grotius, even, whose doctrines led away from democracy, declared that the chief quality and privilege of man was freedom. || The State, according to Spinoza, is best when it is a democracy, founded by the free compact of men emergent from a state of nature, 'for men are so made by God or nature full of wild impulses which can only be virtuously tamed and developed when they freely submit to each other'. § Then, 'birthrights' and the 'state of nature' became naturalized in England; there is talk of inheritances which have been lost ¶ and the question is asked, 'Why, if people find the laws are not suitable to freemen they should be deterred from altering them?' \*\* The laws of nature and of nations are declared to be sufficient warrant that men shall save themselves if authority should command that which tends to the destruction of the people. †† 'For my parte, I thinke I shall never doe any thinge against conscience, and I shall have those hopes of others.' 'That which is dead unto mee is my freedom. It is that I would enjoy, and I will enjoy it if I can.' ‡‡ What are men if they cannot develop that which lies within them without unnecessary bonds? 'I doe thinke that the main cause why Almighty God gave men reason, itt was, that they should make use of that reason, and that

\* Op. cit., p. 190.

† Ibid., pp. 139, 140.

‡ Gooch, op. cit., p. 21.

|| *De Jure Belli et Pacis*, I, 2.

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¶ *Clarke Papers*, p. 235.

\*\* Ibid., p. 247.

†† Ibid., p. 260.

‡‡ Ibid., p. 273. Cf. Patrick Henry (Debate in Virginian Convention, 25 June 1788; Elliot, *Debates*, III, p. 652): 'My head, my hand, and my heart, shall be at liberty to retrieve the loss of liberty.' . . .



And so many others.

All this was systematized by John Locke—‘a rational creature cannot be supposed, when free to put himself into subjection to another for his own harm’—and the *Essays on Civil Government* exercised a tremendous influence upon the Continent and in the American Colonies. Indeed to quote Locke is with certain differences of style and passion to quote Rousseau, Patrick Henry, and Thomas Jefferson.

The early impulse which expressed itself in theological terms as the spirit of God freely moving and developing itself in human beings, which it was sinful to confine or injure, became gradually more rational : self-maintenance and development are the ends in Locke ; in Rousseau, to conserve and develop our ‘natural’, our good selves, and, in Paine, to develop the ‘dormant mass of sense.’ . . .<sup>1</sup> In freedom Milton sought the value of fully developed virtue,<sup>2</sup> and the progress of faith and knowledge.<sup>3</sup> Jefferson emphasized the involuntary nature of belief,<sup>4</sup> and urged that uniformity of belief was as undesirable as uniformity of face and stature. With Humboldt the joy in variety of human development was even more emphatically expressed and systematically treated, and John Stuart Mill borrowed from him the motto, ‘The grand, leading principle, towards which every argument enfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity,’ and then continued, but in a different age, its expansion and institutional form. To Kant, free activity was the only condition for a life at all worthy of man, for this alone, the separatist spirit, exhibited in his envious

they should improve itt for that end and purpose that God gave itt them. Therefore I say, that either itt must bee the law of God or the law of man that must permitte the meaneest man in the Kingdom to have this benefit (to vote) as well as the greatest. I doe nott finde any thinge in the law of God, that a Lord shall chuse 20 Burgesses, and a Gentleman butt two, or a poor man shall chuse none. I finde no such thinge in the law of nature, nor in the law of nations.’ \* We are free, we are equal ! Most piercing of all is this cry ‘for really I thinke that the poorest hee that is in England hath a life to live as the greatest hee ; and therefore truly, Sir, I thinke itt’s cleare, that every man that is to live under a Government ought first by his owne consente to put himself under that Government ; and I doe thinke that the poorest man in England is nott att all bound in a stricte sence to that Government that he hath nott had a voice to putt himself under.’ . . . †

<sup>1</sup> Op. cit., p. 92 : ‘There is existing in man a mass of sense lying in a dormant state, and which, unless something excites to action, will descend to him, in that condition to the grave. As it is to the advantage of society that the whole of its faculties should be employed, the construction of government ought to be such as to bring forward by a quiet and regular operation, all that extent of capacity which never fails to appear in revolution.’

<sup>2</sup> *Areopagitica* : ‘For God sure esteems the growth and completing of one virtuous person, more than the restraint of ten vicious.’

<sup>3</sup> Ibid.

<sup>4</sup> *Notes on Virginia* (1781) : ‘The error seems not sufficiently eradicated, that the operation of the mind, as well as the acts of the body, are subject to the coercion of laws.’

<sup>1</sup> *Clarke Papers*, p. 304.

† Ibid., p. 301.

jealousy, his vanity, his insatiable acquisitiveness, and desire of power, awoke and fostered the development of his excellent capacities unto the day of the perfect society. Given liberty and equal conditions to what may not man aspire? There never was a Social Contract; but the legislator ought to act as though there were! <sup>1</sup>

The essence of the democratic tendency to the end of the eighteenth century is a denial of inherent royal rights, the assertion of individual sovereignty, the growth of belief in equality of consciences, and religious toleration, the development of the idea of beauty in variety, and the faith that nature, acting unimpeded in self-governing individuals, would produce works of the highest and holiest value. Only where this faith could reasonably be demonstrated to have failed ought authority to intervene, and authority could not be constituted except by the joint will of the people. We possess great goods, said men, of their mental and physical faculties.<sup>2</sup> Why then should they not have their fullest development? All in all, the supreme good lay in liberty, that is, to interpret the many sayings, *the exemption of men from any burdens other than those imposed by the rationally proven nature of environment or men, assuming we were to begin life anew, with all the results of irrational tradition abolished.*

Certain more immediate practical considerations weighed with democratic theorists, for example, the Physiocrats, or Harrington, who showed how a democratic form of government would draw the best talents into leadership, diminish the causes of sedition, promote eugenic marriage by the reduction of large fortunes, and give strength to empire, while others, like Paine, argued that popular government was the only form which could assemble the practical knowledge of 'the various parts of society', while, also, it was often remarked how non-representative government imposed the burdens of obedience and taxation upon those who had no say in government, since even when men knew all there was to know they could not do others justice owing to their 'interest-begotten prejudices'.

It is just to say, I think, that this evolution of political theory, and of sentiment, was protestant, revolutionary and negatory, and only vaguely conscious of what would be established in the place of that which was to be swept away. It was thought sufficient to furnish a dissolvent of ancient irrational laws and institutions, and to insist on the criterion that all men ought to be free and equal according to the promptings and designs of nature. Freedom and equality were, of course, endowed with meaning by the different men, social classes, and groups who used them, according to the interests of their time and place, for the question naturally arose, when we admit the free power to evolve, what direction will each take? The full drift of

<sup>1</sup> *Principles of Politics : Principles of Political Right*, Proposition 4.

<sup>2</sup> Schiller, *Don Carlos*.

this question was not apprehended until about 1848, for until then the immediate tasks of demolition fully occupied men's minds and energies. Then the far-reaching purport of the doctrines began to be perceived, and their force politically harnessed: and we might say that one generation after 1848, democracy as liberty ended, socialism being enthroned in its place. We have treated this in the Chapter on State Activity, and will come upon it again at a later stage. Let us now briefly consider what institutions the democratic theorists suggested.

**Democratic Institutions.** There were (1) a written constitution; (2) with a declaration of rights implying a limitation of the sphere of government; (3) majority rule, usually control of a government by an elected legislature; (4) the separation of the powers of government so that each power might check and balance the other; (5) public education to produce the knowledge and spirit appropriate to democratic government.

(1) **Written Constitutions.** These naturally had their origin in the ideas of a state of nature followed by a compact among the natural individuals creating a political association; they followed from either the purely rational natural law associationism of men like Althusius,<sup>1</sup> Harrington,<sup>2</sup> Spinoza,<sup>3</sup> Locke,<sup>4</sup> Rousseau,<sup>5</sup> Kant,<sup>6</sup> Paine<sup>7</sup> and others, or the covenants between men and God as elaborated from the material of the Old Testament by such thinkers as Junius Brutus and the Puritans.<sup>8</sup> Hence, too, the evolution of the idea of special constitutional conventions, and popular ratification and a difficult amending process.<sup>9</sup> The end, as Harrington said, was a commonwealth, 'a government of laws and not of men'.<sup>10</sup> What was the result of this current, and the nature of constitutions we discuss in Chapter VII.

(2) **A Declaration of Rights** laid certain positive limitations upon government. These were already formulated in a very broad way by the Army in its draft treaties with Parliament in 1647.<sup>11</sup> Harrington urged the limitation of the sovereignty of the great association, asking 'whether power, not confined to the bounds of reason and virtue, has any other bounds than those of vice and passion?'<sup>12</sup> The whole of Locke's work reposes upon this notion, that only specifically transferred

<sup>1</sup> *Politica Methodice Digesta* (1603).

<sup>2</sup> *Oceana* (1656).

<sup>3</sup> *Tractatus Theologico-Politicus* (published anon. 1670).

<sup>4</sup> *On Civil Government* (1689).

<sup>5</sup> *Social Contract* (1762).

<sup>6</sup> *Principles of Politics*.

<sup>7</sup> *Rights of Man* (1791).

<sup>8</sup> Borgeaud, *Rise of Modern Democracy in Old and New England*, London, 1894.

<sup>9</sup> Cf. Borgeaud, *Adoption and Amendment of Constitutions in Europe and America*, trans. by C. D. Hazen, New York and London, 1895.

<sup>10</sup> *Op. cit.*, p. 42.

<sup>11</sup> S. R. Gardiner, *The Constitutional Documents of the Puritan Revolution, 1628-60*.

<sup>12</sup> *Oceana*, pp. 102, 103: 'And forasmuch as sovereign power is a necessary but a formidable creature, not unlike the powder which (as you are soldiers) is at once your safety and your danger, being subject to take fire against you as well as for you, how well and securely is she by your galaxies so collected as to be in full force and vigour, and yet so distributed that it is impossible you should be blown up by your

powers can be legitimately executed by the government. And we shall see how the constitutions of the independent American Colonies, and hence most written constitutions, were based on the same idea, namely the greatest possible exemption of individuals from associative control. It is not inappropriate to observe here that less happy countries, like the German States, which suffered absolute or almost absolute government until 1919, found a certain relief in the principles of the *Rechtsstaat*. The *Rechtsstaat* means a state in which the activities of the executive are permanently subject to legal rules which are implemented and safeguarded by independent and impartial law courts. Its great protagonists were originally Kant<sup>1</sup> and Humboldt, but later and with more system the German Liberals of 1848 elaborated it in their written constitution, the idea culminating in the work of the jurists Von Mohl<sup>2</sup> and Von Gneist.<sup>3</sup> The substance of the rules is, of course, of as great importance as their guarantee, and many could have no validity unless they were not merely executive decrees, but laws made with the co-operation of representative parliaments. Ideally, they would embody such limitations of governmental power as are implied in the rights declared in free constitutions, such as tolerance of religious differences, equality before the law, and others. But between the *Rechtsstaat* of the Germans (a notion of great value as we shall see in discussing the idea of the Separation of Powers) and the constitutional limitations in free states there was this great difference—in the *Rechtsstaat* the State was represented by the sovereign monarch and his bureaucracy; in the democratic state, the State was represented also by a popularly elected Parliament, and the limitation was thus of a different nature.<sup>4</sup> We shall later examine the constitutions and the meaning of the rights they declare; and we shall see that strong modern forces constantly encroach upon them, in some

own magazine? Let them who will have it, that power if it be confined cannot be sovereign, tell us, whether our rivers do not enjoy a more secure and fruitful reign within their proper banks, than if it were lawful for them, in ravaging our harvests to spill themselves? whether souls, not confined to their peculiar bodies, do govern them any more than those of witches in their trances? whether power, not confined to the bounds of reason and virtue, has any other bounds than those of vice and passion? or if vice and passion be boundless, and reason and virtue have certain limits, on which of these thrones holy men should anoint their sovereign? But to blow away this dust, the sovereign power of a commonwealth is no more bounded, that is to say straitened, than that of a monarch; but is balanced. . . . Receive the sovereign power; you have received it, hold it fast, embrace it for ever in your shining arms. The virtue of the loadstone is not impaired or limited, but receives strength and nourishment, by being bound in iron.'

<sup>1</sup> Op. cit.

<sup>2</sup> R. von Mohl, *Literatur der Staatswissenschaft*, I, 297; and his *Polizei Wissenschaft*.

<sup>3</sup> Von Gneist, *Der Rechtsstaat*, Berlin, 1879. Cf. Jellinek, *System der Subjektiven Rechte*.

<sup>4</sup> The German doctrine of 'auto-limitation', that is, of the self-control of the Sovereign, goes some way towards the securing of individual rights; and a democracy might be no better. Yet all depends on the comparative 'temper' of a monarchical and a popular system. Normally the latter will be more moderate.

cases to their utter destruction. This is, as we have seen, because the freedom of the individual has been found, in its modern environment, to be on the whole noxious, not only to other goods, but even to the general Freedom itself.

(3) We speak of the implications of popular control of government in later chapters, and here we need comment only upon two things : who were 'the people', and what actual part the people were to play in government. As regards the first, we show at a later stage that there was great, perhaps intentional, vagueness, and that it took revolutions to make the definition into 'universal franchise', for whoever acquired the vote tended to consider that liberty needed no further development. The Levellers and Rousseau alone, to the time of the French Revolution, went the whole hog, the mass of English middle-class theorists being Whiggish, that is, prepared to represent the 'people', i.e. the poor, but not to let them represent themselves.<sup>1</sup>

It was seen that however the 'people' was defined, unanimity was impossible in practice, and therefore a majority must suffice. Thus Locke,<sup>2</sup> thus also Rousseau.<sup>3</sup>

**Majority Rule.** There is nothing especially sacrosanct about majority rule : like all political institutions it is founded in average human nature. Some convention must be at the base of associated activity ; upon what, then, is that of majority rule founded ? First, waiving the impossibility of an objective measure of the *importance* of such person or group, it is clear that, normally and in the long run, the majority possesses overwhelming power, physically and mentally. (It always get the army on its side in the end.) Secondly, since, on the democratic assumption, every conscience is as worthy as any other, and there is eternal doubt who is right, the majority has a sound claim to rule. Thirdly, unanimity is impossible to achieve. Fourthly, to admit the right of a minority to rule involves the difficulty, which minority ? It gives all minorities equal right, that is, it destroys the integration of society.<sup>4</sup> Majority rule serves as an integrative associative force—you must overcome your differences, and *unite* in order to rule. Moreover, there is enormous political power in the general tendency of the average person to believe that the majority must be right. But minorities only accept their situation on terms : where the chance is open to them one day to become part of the ruling majority, to contribute to its dictates (permanent, unrelieved minority produces revolt), and secondly, not to be *oppressed*

<sup>1</sup> Veitch, *Genesis of Parliamentary Reform*.

<sup>2</sup> *On Civil Government*, Bk. II, par. 140.

<sup>3</sup> *Social Contract*, Bk. IV, Chap. II. Cf. also Heinberg, *History of the Majority Principle*, *American Political Science Review*, 1926, XX, 52-68.

<sup>4</sup> Cf. Kelsen, *Vom Wesen der Demokratie*, edition 1929 ; and Smend, *Verfassung und Verfassungsrecht*, 1929.

while in a condition of minority. It is, of course, extremely difficult to maintain the assumptions of majority rule, where there are obvious and persistent racial, class or cultural differences in a State, and where some groups, Negroes, Jews, Communists, or paupers, are excluded from political life.

Secondly, are the people to make and unmake Governments by election, or merely to furnish representatives for guidance to irresponsible rulers? On this question, also, there is great disagreement. We return to it in Chapter XI.

Now, democracy disturbs the liberals, for, if the right of the majority is sacred, what becomes of the freedom of the minority? This question assumes a more critical importance if one follows Rousseau's lead than Locke's; for, whereas Locke sets strict limits to the powers of the State, and checks them by the separation of executive from legislative power, Rousseau recognizes no limits to society's power once the contract is made,<sup>1</sup> and jeers at Montesquieu for pretending that sovereignty is divisible.<sup>2</sup> Government without safeguards for minorities has seemed to the Fathers of the American Constitution, and to men like Mill, the negation of liberty; indeed, to all who have some spiritual or material good which they would zealously retain, pure majority rule has seemed a peril. Hence the demand that the force of the rule be limited, by such devices as Proportional Representation, property and educational qualifications for the franchise, State representation in a Federal State, local self-government and, more recently, Group or Vocational Representation. Calhoun supported his Federal theories upon such a basis, and his thesis is, essentially, that of all minority parties:

'There are two different modes in which the sense of the community may be taken: one, simply by the right of suffrage, unaided; the other, by the right through a proper organism. Each collects the sense of the majority. But one regards numbers only and considers the whole community as a unit, having but one common interest throughout; and collects the sense of the

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<sup>1</sup> Rousseau was contradictory on this subject. Thus: 'As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also; and it is this power which, under the direction of the general will, bears, as I have said, the name of sovereignty.' . . . *Social Contract*, Bk. II, Chap. IV, p. 27 (Everyman Edition).

<sup>2</sup> . . . 'But our political theorists, unable to divide Sovereignty in principle, divide it according to its object: into force and will; into legislative power and executive power; into rights of taxation, justice and war; into internal administration and power of foreign treaty. Sometimes they confuse all these sections, and sometimes they distinguish them; they turn the Sovereign into a fantastic being composed of several connected pieces: it is as if they were making man of several bodies, one with eyes, one with arms, another with feet, and each with nothing besides. We are told that the jugglers of Japan dismember a child before the eyes of the spectators; then they throw all the members into the air one after another, and the child falls down alive and whole. The conjuring tricks of our political theorists are very like that; they first dismember the body politic by an illusion worthy of a fair, and then join it together again we know not how.'—*Ibid.*, Bk. II, Chap. II, pp. 23, 24.

greater number of the whole, as that of the community. The other, on the contrary, regards interests as well as numbers; considering the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each through its appropriate organ, and the united sense of all, as the sense of the entire community. The former of these I shall call the numerical, or absolute majority; and the latter, the concurrent, or constitutional majority.<sup>1</sup>

Now, he says, in popular thought, these two kinds of majority are confounded; and this causes the rights, powers and minorities of the whole people to be attributed to the numerical majority. This is not the government of the people; it is but the government of the major part over the minor. This is force, and the only way to meet it ultimately is force. Yet this, again, would produce anarchy. Then anarchy must be avoided by a balance of power provided in the constitution. Only this is Godly.<sup>2</sup>

'The necessary consequence, then, of taking the sense of the community by the concurrent majority is, as has been explained, to give to each interest or portion of the community a negative on the others. It is this mutual negative among its various conflicting interests which invests each with the power of protecting itself; and places the rights and safety of each, where only they can be securely placed, under its own guardianship. Without this there can be no systematic, peaceful, or effective resistance to the natural tendency of each to come into conflict with the others: and without this there can be no constitution. It is this negative power, the power of preventing or arresting the action of the government—be it called by what term it may—veto, interposition, nullification, check, or balance of power, which, in fact, forms the constitution.'<sup>3</sup>

**The Social Contract is an Unequal Contract.** The experience of government in the nineteenth century, in short, rapidly and brusquely called attention to the fact that *the mass of individuals, free and equal, did not, as Rousseau said, and as Locke and others vaguely suggested, give to Society an equal amount and receive from it the same amount.*<sup>4</sup> That would have been true only if Rousseau had proved his hypothesis, that all men were naturally equal. There is some excuse for such an abstraction where industry and agriculture are in a relatively primitive stage and men are largely equal, if only in their misery. We know, however, that the differences between men's capacities are

<sup>1</sup> Calhoun, *A Disquisition on Government*, ed. by R. K. Cralle, Columbia S.C., 1851, p. 28.

<sup>2</sup> 'Traced to this source, the voice of a people—uttered under the necessity of avoiding the greatest of calamities, through the organs of a government so constructed as to suppress the expression of all partial and selfish interests, and to give a full and faithful utterance to the sense of the whole community, in reference to its common welfare—may, without impiety, be called *the voice of God*. To call any other so, would be impious.'—*Ibid.*, p. 39.

<sup>3</sup> *Ibid.*, p. 35.

<sup>4</sup> 'Finally, each man, in giving himself to all, gives himself to nobody; and as there is no associate over whom he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has.'—Rousseau, *Social Contract*, Bk. I, Chap. VI, p. 15.

tremendous, and between their economic and spiritual interests prodigious. We know also that government commends itself to them not on uniform grounds, but on grounds as diverse as their nature and interests. We know, or ought to know, what is much more important, that as a rule they attempt to subject each other in return for a price lower than the good they hope to obtain, and that their sovereign-subject relationship is not a predetermined static and authoritative one, but that the social contract between millions of diverse individuals and groups is overthrown, and reformed every day and every minute, and that its terms are subject to the fluctuating fortunes of a ferocious and incessant battle. It may be that each man and woman gets from the State more than he gives, owing to the tremendous advantage given by associated action in so large a community. That, in fact, keeps it as stable as it is. Yet many give less in proportion to what they receive than others, while great multitudes contribute much more in proportion to what they receive than other people do. Some are plain exploiters, bandits.

One of the defensive and offensive weapons in that passionate scramble is the 'special safeguard of the minority'. In proportion as government has enhanced its mighty power, the safeguard is the more anxiously sought; and differences among citizens are championed rather than social uniformities. Both in practice and theory the legend of the sacredness of the majority is steadily being undermined; either by institutions—i.e. systematic restraints—or by the growth of the convention that though one has the power it should be used with a sense of obligation to the minority. The theory of toleration which began with religious differences has now extended to the general campaign in civil policy, for this has swallowed up religion. Men have in the last few generations become extraordinarily sensitive to the advantages of toleration for churches, and minorities of all kinds, federalism, pluralism and local self-government.<sup>1</sup> For they claim equality of consciences in a day when political conscience comprehends almost all of man's interests, and when inequality, therefore, is fraught with the gravest consequences. What has become of the principle of the majority we shall see in a later part of this work.

(4) Next, a long line of theorists including Locke, but commencing principally with Montesquieu, have sought the liberty of the individual in the separation of powers, that is, in such an arrangement of the various institutions of government that each should prevent the other from having sufficient power to act tyrannically. Montesquieu suggested the separation of the legislative, executive and judicial institutions, the American Constitutions included it, and the French Revolution went so far as to say that without it there is no constitution.

<sup>1</sup> Laski, *The Grammar of Politics*, and other works, is the foremost living exponent of this trend.



Later, liberals like Benjamin Constant and his generation, and De Tocqueville, and more recent theorists have elaborated Montesquieu's doctrine to include the division of power between the central and the local authorities. The object is plain: to render government as nearly powerless as is compatible with the most urgent dictates of associated activity. It is obvious that democracy thus organized has different intentions and consequences from democracy as the plain unchecked government of the majority. It is founded, in fact, upon a distrust of any sovereignty, of the one, the few or the many, unchecked by formal restraints: the kernel of De Tocqueville is: 'Forms safeguard Liberty.' Seeking, ostensibly, the good of all individual men, namely their dissociated, and therefore free, development, it denies the good of government by all, unless the counsels of government are protracted, and its will divided. This is a useful theory for those who have something to guard, but a wasteful obstacle to those who have urgent wants. Consequently, democracies based on universal franchise, especially those where the leaders are in the hurry of reformative passion, tend to overthrow the separation of powers, even that which is vested in the rights of a Parliamentary opposition.<sup>1</sup> The best, that is, the extreme, even pathological, illustrations are observable in Russia. But the following chapter is devoted entirely to the study of the separation of powers, and we do not need any further to anticipate its conclusions.

(5) Finally, all save the earliest religious enthusiasts have recognized the need for the existence, even the inculcation, of a special spirit in democratic government. For, as we saw in our analysis of the debate between Ireton and the Levellers, if the principle of the independent grace of men is pressed, as it very easily is, beyond the principle that men are equal before the Lord, then there is the constant expectation that men's hands will be raised against each other. This is also obvious in Calhoun's argument. Consequently, more circum-spect thinkers have sought to define the spirit appropriate to the continuance of an association of individuals, and they are not concerned with continuance alone; they think, if they do not speak, of a *creative* continuance.

'A man,' says Harrington, 'is a spirit raised by the magic of Nature; if she does not stand safe, and so that she may set him to some good and useful work, he spits fire, and blows up castles; for where there is life, there must be motion or work; and the work of idleness is mischief, but the work of industry is health. To set men to this, the commonwealth must begin betimes with them, or it will be too late; and the means whereby she sets them to it is education, the plastic art of government.'<sup>2</sup>

And he spends many pages discussing the appropriate education

<sup>1</sup> Cf. Chapter on Parliamentary Procedure, *infra*.

<sup>2</sup> Cf. Harrington, *op. cit.*, p. 202 ff.

for the various orders in the commonwealth. Montesquieu's discussion is perhaps more famous. Every form of government has its special principle, that is 'that by which it is made to act—the human passions which set it in motion'.<sup>1</sup> In a monarchy honour, ambition, glory and love of applause maintain the State. In an aristocracy moderation as between the aristocrats, that is a virile recognition of equality among the rulers, not indolence or pusillanimity. But in a democracy 'one thing more is necessary, namely, *virtue*'.<sup>2</sup> Why? Because here the 'person who commands the execution of the laws feels that he himself is subject to them and that he must bear their burden'. When a king is indolent or ill-advised a remedy may be found: when the people are such the State is necessarily lost, for the ill is general. What then is virtue? Montesquieu defines it negatively by imagining what happens when virtue is banished and later, positively:

'When virtue is banished, ambition invades the minds of those who are disposed to receive it, and avarice possesses the whole community. The objects of their desires are changed; what they were fond of before has become indifferent; they were free while under the restraint of laws, but they would fain now be free to act against law; and as each citizen is like a slave who has run away from his master, that which was a maxim of equity he calls rigour; that which was a rule of action he styles constraint, and to precaution he gives the name of fear. Frugality, and not the thirst of gain, now passes for avarice. Formerly the wealth of individuals constituted the public treasure; but now this has become the patrimony of private persons. The members of the commonwealth riot on the public spoils, and its strength is only the power of a few, and the licence of many . . .'<sup>3</sup> 'It is in a republican government that the whole power of education is required. The fear of disposed governments naturally arises of itself amidst threats and punishments; the honour of monarchies is favoured by the passions, and favours them in its turn; but *virtue is a self-renunciation, which is ever arduous and painful*.'<sup>4</sup>

'This virtue may be defined as the love of the laws and of our country. As such love requires a constant preference of public to private interest, it is the source of all private virtues; for they are nothing more than this very preference itself. This love is peculiar to democracies. In these alone the government is intrusted to private citizens. Now a government is like everything else: to preserve it we must love it.'

One thing alone has Montesquieu omitted: to preserve democracy we must not only love it, but sacrifice other things we love to its preservation. Democrats can only maintain democracy by renouncing some of the fruits of perfect freedom; for their machine, and the fruits also, may be destroyed altogether by too great a strain. It means that some of our desires must be altogether suppressed, and some put off to the future; that we must be content with small mercies; that 'gradualness is inevitable'. Our impatience must be assuaged by the belief that in the eternal sweep of time more good

<sup>1</sup> Montesquieu, op. cit., Vol. I, Bk. III, Chap. III, p. 20.

<sup>2</sup> Ibid., p. 21.

<sup>3</sup> Ibid., p. 22.

<sup>4</sup> Ibid., Bk. IV, Chap. V, p. 36.

will come of this partial renunciation than from the demand that others shall be subjected to us. In proportion as such a belief is not natural to man, or incapable of being inculcated, there may be democracy, but not freedom, and, in its extreme form, democracy may become a form of government more intolerable than any other.<sup>1</sup>

Rousseau treats of the subject, though not very profoundly, in the *Social Contract*, saying, 'There is therefore a purely civil profession of faith of which the sovereign should fix the articles, not exactly as religious dogmas, but as social sentiments, without which a man cannot be a good citizen or a faithful subject.' But then Rousseau only gives a bare indication of the content of this faith.<sup>2</sup> In an earlier chapter he admits that though the State, in making the laws, can do no wrong, yet the judgement of the people may be unwise. The inference is that to make the sovereign wise a process of education is necessary. We have seen how the Physiocrats came to believe in freedom plus public education. The line of such beliefs could be traced through the Utilitarians down to the present,<sup>3</sup> and it is a vital part of the democratic form of government, of urgent practical importance in our own day. In its own way, democracy requires the preparation of such Discourses as Bossuet wrote for the Dauphin, and the Testaments which Richelieu and the absolute monarchs bequeathed to their successors. The subject, however, is dealt with, though indirectly, in the chapters on the People and Parliament.

Only one more task remains to be accomplished in this chapter, and that is, to indicate the stages of democratic development.

The first stage was the demand for tolerance of nonconformity in religion and the rise of self-governing sects like the Independents, the Separatists, the Presbyterians. They cannot be entirely identified with the middle classes and small commercial men. In the American colonies, the small and middling people, who had torn themselves out of the English agricultural background, formed the centre of the movement. The very rich and the fairly rich held with Bishop and King; they were the nobles, the great landowners and the governors of their counties.

Though an undercurrent of social criticism, beginning with Wycliffe and John Ball, came out again in the Levellers and the Diggers, these were not the classes to triumph in the English Revolution. They

<sup>1</sup> Montesquieu, op. cit., Vol. I, Bk. VIII, pp. 118-22.

<sup>2</sup> *Social Contract*, Bk. IV, Chap. VIII, p. 121. To be just to him, we ought to bear in mind his theories expressed in *Émile*, at least.

<sup>3</sup> 'Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render them safe, their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment to our constitution must here come in aid of the public education.'—*Notes on Virginia*. Cf. also James Mill, *Essay on Government*, 1819.

helped the commercial classes of the towns, and the well-off yeomen, to claim rights of parliamentary control over taxation, and regulation of trade, but they helped for the attainment of *general* liberties, 'to assert and vindicate the just power and rights of this Kingdome in Parliament for those common ends premised against all arbitrary power, violence, and oppression, and against all particular parties or interest whatsoever.'<sup>1</sup> They did not know what the experience of 250 years has since taught, that Parliamentary leaders might speak in the same terms as the common man, but that they necessarily meant something quite different, from 'interest-begotten prejudice'. The peasants in all lands had sporadically revolted, and had been used by the Crown, the Nobles and the Towns for *their* liberties; the day of the rank and file was not yet, for while their leaders were organized, armed and disciplined, they were not.

A great impetus was given to the democratic movement by the revolt of the Netherlands and the creation of a Republic, for English observers much envied Dutch institutions, and had, as they have to-day, especially jealous admiration for any country which is rich. In fact, freedom and commercial power are correlated, for commercial power depends upon the ability to buy and sell in the best market, regardless of religious or social differences.

In France and England the townsfolk led the movement for representative government. Their commercial and industrial interests urged them to make of parliament the executive instrument of their policy and social ambitions; and the very existence of numbers of people in close proximity and constant intercourse caused the growth of freer manners and a regard for the essential man. In Germany the proverb was coined: 'The atmosphere of the town makes a man free.'<sup>2</sup> In France the *Third Estate* was a much more definite class than in England: not clergy, not noble, it stood between these and the peasantry. By the last *États Generaux* it had shown itself exceedingly pretentious, and after their suppression it still held some governmental power in the *Parlements*, that is the *semi*-legislative, semi-judicial bodies, which checked and controlled the power of Crown and Intendant, and it permeated the bureaucracy with its sons. The French Revolution was its revolution, although as in the English Revolution the poor of the towns and the countryside followed them, partly for certain definite benefits like fair taxation, guarantee of property, equality before the law, right to participate in government, administratively and legislatively, and partly for the general benefits of free and settled rule. At a sad, but perhaps unavoidable moment, the practical elaboration of the Revolutionary principles was checked by the necessity of defence against the more feudal countries; Napoleonic genius was needed, but it converted France into a bar-

<sup>1</sup> *Clarke Papers*, XXXV.

<sup>2</sup> *Stadtluft macht Frei*.

racks, the opposite of a democracy, and soon the forces of 'legitimacy' triumphed. The main benefits of twenty years of struggle accrued to the returned nobility and the rising commercial and industrial families, who alone were the '*pays legal*', and their leaders produced the philosophy of Liberalism—namely, neither uncharted monarchy nor unlimited democracy, but the government of Reason, represented by the wealthy people, with a restricted franchise, restricted centralization, judicial restriction of the executive, and political parties balancing each other.

The balance of power seemed, as Harrington said, to follow the balance of property.<sup>1</sup> Those who had the material means, or were nearest to their attainment, sought liberty for themselves, and having obtained it, by revolution or its threat, did not share it until they in turn were frightened or forced.

In America, a new country, settled (though not entirely) by people with strong democratic convictions, gave the first great opportunity for popular government. Even here, however, different spiritual and economic interests had been brought from Europe, and the path of democracy was neither open nor smooth. The non-existence of remarkable inequality in estates made it very difficult to maintain other social distinctions for long, though wherever the influence of the British Crown penetrated, it brought swarms of 'aristocratic parasites around the governor's palace or the chief seats of the Anglican Church. Where, however, land was cheap and freehold a property qualification was not a serious limitation upon democracy. Government of town and church were even more democratic. Little by little, however, a cleavage arose between the people of the coast and tidal rivers interested in commerce, industry and finance, and the yeomen of the hinterland, and by the time of the American War of Independence, this gulf was very marked. So that the constitutional debates of the time are full of the difference between the agrarian and the manufacturing 'interests'. More, the Revolution had been very largely a war of trade and commerce, though we may add thereto the spirit of pride, independence, and as James I once called it the 'gust of Government'. The practical drive was there. But all classes were drawn in by cries like those of Patrick Henry—'Give me liberty or give me death!' Where people are excited by such talk, and are flattered by those who need their help to fight battles, they are apt to continue to believe what they have been told long after their leaders have forgotten their promises. What were they told? This:

'that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit

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<sup>1</sup> Op. cit., pp. 59, 60.

of Happiness. That to serve these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter and abolish it and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.'

The royal executive and nominated council had fled : and government was conducted by elected assemblies representative of agrarian interests. These began to govern in their own interests, putting off payment of debts and issuing paper money. The Separation of Powers and Checks and Balances suddenly became of vital importance to those who feared such movements, and Montesquieu was acknowledged to be to political science what Homer had been to Greek literature. America expanded westward, and the equalitarian aspect of democratic thought was ever renewed, and constitution after constitution embodied the early Puritan principles, now vivified by the morality of the pioneers. The day has not yet come for the deliberate overthrow of the Separation of Powers, but it will come ; to-day America is so well off that we see there the spectacle of a nation which keeps its bun, Democracy, and yet eats it, by the Separation of Powers.

The rise of manufactures in England urged forward the commercial and industrial middle class to obtain parliamentary reform, and this they accomplished in 1832 with the aid of a threat that the working classes would revolt. These classes soon realized that they would get nothing unless they obtained it for themselves, and the Chartist movement was organized. Its political points are worth repetition. They were :

1. Franchise for all adult men.
2. Voting by ballot.
3. Three hundred constituencies, divided as equally as possible on the basis of the last census ; to be amended after each census.
4. Annual Parliaments.
5. No property qualification for Parliamentary Candidates.
6. Members of Parliament to be paid.

Similar things were happening abroad. In France and Germany <sup>1</sup> the upper and middle classes were enjoying the fruits of the Liberal revolutions, especially since manufactures required *laissez-faire*. It is true that the liberal *intelligentsia* furnished the theories, which redounded to the ultimate advantage of the workers, but the power to move the *bourgeoisie* was beyond them : to do this required the exertion of one interest against another.

By 1848 the interests below were already grappling with those above, but already a new element had entered, destined to end the struggle by a victory for universal franchise, and to change the nature

<sup>1</sup> In 1848 election manifestoes.

of democratic government. The peculiar economic claims of the working classes, arising out of the nature of factory industry and the capitalistic system, resulted in the conversion of the claims for a rather abstract political freedom—the freedom of governmental negation or political dissociation—into the claims for economic equality. The Chartists in England, Lassalle, Marx and Engels in Germany, and Fourier, Saint-Simon and Proudhon in France preached more or less consciously, not *dis*-sociation, but its extreme opposite, Socialism. No cry or demand could have been more effectual, in an age of acquisitiveness, or as Montesquieu expresses it, of the ‘*desire of having*’, to call the non-enfranchized to the conquest of political power, and it brought the people in.

Further, the existence of the franchise for some citizens necessarily brought about an extension of it for all: for the enfranchized had different interests, and in order to win power by a majority of votes they were bound to compete with each other for popular approval by campaigns of political excitement. They brought in outsiders to win their battles for them, just like the Tyrants and parties in Athens, and the Catholics and Protestants during the wars of religion; and here as there, the strangers stayed, to become masters.

Finally, the liberal and the rational mind could not help, in the long run, admitting the right of women to political power.

\* \* \* \* \*

Out of the developments, spiritual and environmental, of the last three centuries, certain principles of governmental organization have arisen, and these we have to consider in turn. The most elemental features are the Separation of Powers, Written Constitutions, the central-local arrangement (Federalism), and the organization of People, Parliaments and Executive. We proceed to these.

## CHAPTER VI

### THE SEPARATION OF POWERS: FALSE AND TRUE

#### THE EIGHTEENTH AND NINETEENTH CENTURIES

THE Separation of Powers meant nothing to political science until the issue of political liberty became urgent. It began to acquire meaning in the seventeenth century ; and, in the eighteenth, with the advent of critical times, it came to the forefront of discussion. It is an important subject, for like other things it has fallen into the hands of partisans and needs rescue ; while impartial analysis vividly reveals the nature of the modern State. Let us then attempt an answer to these questions : Who invented the theory ? What is the theory ? What does it mean ? What was its historical setting ? What was its derivation ? and what were its practical consequences ?

The theory of the Separation of Powers was invented by Montesquieu, and appears in *l'Esprit des Lois*, Book XI. But the full meaning of that book is only obtainable when read together with the rest of the work, for Montesquieu's own spirit appears in one continuous emanation all through it. Further, the theory was his *invention*, although there are traces of it in John Locke's *Civil Government*, for with him the theory was a conscious generalization linking the machinery of government to its purpose, while with Locke the theory was rather casual. Of that later.

The theory is this :

'In every government there are three sorts of power : the legislative ; the executive in respect of things dependent on the law of nations ; and the executive in regard to matters that depend on the civil law.'

This is not very intelligible, and the definition is therefore elaborated.

'By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judicial power, and the other simply the executive power of the state.'



Even this is not very clear, since the executive power surely includes more activities (and it did in Montesquieu's time) than are stated. So far Montesquieu had not sufficiently thrown off Locke's casual definitions. However, as soon as he gets into his own stride, Locke is forgotten, and he marches along entirely in his own manner towards political liberty, an object he had in common with Locke, but conceived somewhat differently. He says :

'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, and execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.'

Montesquieu proposes two theses which are not in necessary combination; the first, that there are different *sorts* of powers in government; the second, that to obtain liberty power must not be concentrated. The first it is convenient to discuss at a later stage. We are concerned now with the idea that the separation of the powers will secure liberty. The whole of Montesquieu's work rests upon his profound persuasion that liberty is the highest human good. I do not say passionate persuasion, for Montesquieu was meditative, not active. To understand the Separation of Powers one must understand what Montesquieu meant by political liberty, and, fortunately, he explains himself clearly enough. Once there is a state, 'liberty can only consist in the power of doing what we *ought* to will, and in not being constrained to do what we ought not to will'.<sup>1</sup> That is, liberty is not behaviour outside the law, but within the law. There, within the law, there ought to be no constraint, no unauthorized behaviour by any one. To be independent is not to be at liberty.<sup>2</sup> Does he not mean that independence is *dissociation* from other citizens? I think so; for his distinction between this and liberty is: 'Liberty is a right of doing whatever the laws permit: and if a citizen could do what they forbid, he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.'<sup>3</sup> We may infer from this that all citizens must recognize the reasonableness of the restraints of law; if they do not, there will be the restraints

<sup>1</sup> Bk. XI, 3.

<sup>2</sup> Cf. Locke, *op. cit.*, II, par. 22; Hobbes, *Leviathan*, Chap. XXI; and see *supra*—decisions in Prohibition cases.

<sup>3</sup> *Esprit des Loix*, loc. cit.

of arbitrariness. We may go further. To Montesquieu law is not only written law, nor even this, with the addition of customary law and traditions : it is much more : it is the principle, the *spirit*, of any particular form of government, even, we might go further and say, the spirit of the civilization, desired. That governs the customs, the traditions, and should govern the written law. More, it should govern the form of government. Machinery does not make a government free. 'Democratic and aristocratic states are not in their own nature free.'<sup>1</sup> Where then is liberty secreted? *In the spirit of government*. That is, in something which is as fundamental as liberty in Montesquieu's system : *Moderation*. 'Political liberty is to be found only in moderate governments. Yet it is not always found in these. *It is there only when there is no abuse of power.*'

Now comes a fresh contribution to the theory. Its presence can be detected throughout the *Esprit des Lois*, but it more frequently appears in the form of ancient history than plain statement. 'But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority until he is confronted with limits. Is it not strange that we are obliged to say that *virtue itself has need of limits*? ' How many philosophers and active statesmen have subscribed to this observation, both before and after Montesquieu ! It is, in fact, the central reason for separating powers. 'To prevent this abuse, it is necessary, by a proper disposition of things, that power should be a check to power.' Is this possible? Yes. 'A constitution may be such that no one shall be compelled to do things to which he is not obliged by law, or not to do things which the law permits.'<sup>2</sup>

What does Montesquieu mean? That bodies of people must be set up, the one confronting the other, with the implied threat, that should any go beyond its prescribed sphere it will be challenged by the other; that each shall have a right to certain powers, which it will presumably, and out of its own desire for power, maintain against encroachment.<sup>3</sup> It means that before will can be translated into its ultimate application to citizens, all the bodies concerned must, at least implicitly, have agreed that the will is just. This is nothing other than saying that though sovereignty exists, and must exist, yet it ought to consist in the agreed co-operation of several factors neither of which can exercise functions assigned to the other.

This theory does not depend essentially upon the *nature* of the power exercisable by each authority, or whether Montesquieu has accurately described that nature; and this is partly shown by the fact that he includes an extra check by dividing the legislature into

<sup>1</sup> Bk. XI, 4.

<sup>2</sup> *Ibid.*, loc. cit.

<sup>3</sup> Bk. XI, 6.

two chambers. The distribution among possibly *rival* authorities is the virtue of his system.<sup>1</sup>

What will this system achieve? It will achieve, as in England,<sup>2</sup> political liberty, that is 'a *tranquillity* of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be such that one man need not fear any other. . . .' 'It (political liberty) consists in security, or in the opinion people have of this security.'<sup>3</sup> 'When the subject has no barrier to secure his innocence, he has none for his liberty.'<sup>4</sup>

Now, even as all governments, monarchic, aristocratic or democratic, may be intemperate, and may act despotically, so may any form of government, even a monarchy, be free in Montesquieu's sense, if it observes the rules of separated powers, where none shall grow overmighty. There is nothing more in the separation of powers, and nothing less. So much did Montesquieu say and no more; though he gave examples from the English constitution, and from antiquity.

Certain points need completion and re-emphasis. First, his riveted insistence is upon moderation, however sovereign power is divided. This is the ultimate object of the separation of powers. Separation is not necessary *per se*, but is a product of Montesquieu's desire, and his judgement of the measures necessary to shape human nature thereto.

Secondly, his judgement of human nature is that whoever has

<sup>1</sup> Cf. Hegel, *Philosophy of Right*, trans. by S. W. Dyde, London, 1896, pp. 275, 276: 'Amongst current ideas must be mentioned that regarding the necessary division of the functions of the state. This is a most important feature, which, when taken in its true sense, is rightly regarded as the guarantee of public freedom. . . . The principle of the separation of functions contains the essential element of difference, that is to say, of real rationality. But as apprehended by the abstract understanding it is false when it leads to the view that these several functions are absolutely independent, and it is one-sided when it considers the relation of these functions to one another as negative and mutually limiting. In such a view each function in hostility to or fear of the others acts towards them as towards an evil. Each resolves to oppose the others, effecting by this opposition of forces a general balance, it may be, but not a living unity. But the internal self-direction of the conception, and not any other purpose or utility, contains the absolute source of the different functions. On their account alone the political organization exists as intrinsically rational and as the image of eternal reason. . . .

'To take the negative as the point of departure, and set up as primary the willing of evil and consequent mistrust, and then on this supposition cunningly to devise breakwaters, which in turn require other breakwaters to check their activity, any such contrivance is the mark of a thought, which is at the level of the negative understanding, and of a feeling, which is characteristic of the rabble.—The functions of the state, the executive and the legislative, as they are called, may be made independent of each other. The state is, then, forthwith overthrown, an occurrence which we have witnessed on a vast scale. Or, in so far as the state is essentially self-contained, the struggle of one function to bring the other into subjection effects somehow or other a closer unity, and thus preserves only what is in the state essential and fundamental.'

<sup>2</sup> *Esprit des Lois*, loc. cit.; Dedieu, *Montesquieu et la tradition politique anglaise en France*.

<sup>3</sup> *Esprit des Lois*, Bk. XII, 1.

<sup>4</sup> *Ibid.*, Bk. XII, 2.

unrestrained power will abuse it. What does 'abuse' mean? He does not say, but we may infer that he believes that men are inclined to exert more power than is really necessary having rational regard to the nature of the rights or duties prescribed by law, and, or, that the power will be exerted along paths entirely unwarranted by the law. In other words, the sheer (not necessarily the malevolent) spontaneity of human life, results in a ruthless urging forward, until it is stopped. I repeat, the intention may not be bad, it may even be noble, but if it is unchecked the result is too much of one man, or body of men, and too little of the others. Is it not part of the liberal creed that all consciences are equal? Here is the everlasting difficulty of government which wishes to remain free: to admit the right and the necessity of spontaneous development, and yet to find the norms which shall provide regulation without suppression. We are back once again to the essence of the discussion on democracy.

I do not, however, think that Montesquieu pushed his analysis to its ultimate point. Had he done so he might have made three pertinent additions to his discussion of the psychology of power. The first is this, that any body entrusted with power becomes jealous of it, and develops into a rival of all concurrent or competing authorities. There is not only the desire to evolve one's own power to the final margin, but also the desire to stop other people from executing theirs. Thus, the purpose of the separation of powers is not only secured; it may be surpassed, by jealous destructiveness.

Next, and this is exceptionally important of modern democracy: a secondary but essential use of all separation of power is that it imposes upon each power the need to explain itself; but this, again, is not valuable simply because it illuminates the mind of those to be conciliated, but because in the course of accounting for its attitude, an authority may discover flaws in its own information, logic and principle, and become convinced that a new synthesis is truly necessary. Nothing so imperatively causes a mind to question and remake itself as the obligation to account to some one else.

Thirdly, the instruments of restraint sought for in Montesquieu's time could be no other than those *within* the machinery of government. There is no trace in his writings of the moderating effects of party government. There could be none. With all his leaning towards a republic, he never reckoned in terms of popular government, otherwise he would never have conceived of the people, even as Rousseau did, (who copied out an enormous part of Montesquieu's best work)—as a vast body of equal units acting either isolatedly, or as a solid phalanx called the People. We know, to-day, however, that outside the machine, the parliamentary body, the bureaucracy and the judiciary, there are great organized bodies of electors in a permanent state of tension, mutually restraining one another, and that the

problem of moderation is, in our own day, formulable and soluble only in terms of them.

Montesquieu, like the rest of that great line of liberal thinkers who preceded him, thought in terms of the State, or all the people, or the King or an aristocracy, as a distinct entity confronting an individual, the Citizen. This antithesis we have shown to be the result of a temporary historical situation when governments were still in the coercive and exploitive stages, and ascription to these badly understood entities, of a power which they, in fact, mainly executed as the agents of other men and groups. Nevertheless, it was a convenient, a striking and useful antithesis ; nothing could be better calculated to win the support of every man. But it had a bad effect, because an untrue basis, in converting all discussion of government into one of despotism, and in making freedom from the State, *dissociation*, appear the proper ideal. It was a good solvent, but, as a creative agent, deficient. It served well, however, in Montesquieu's time and for three-quarters of a century thereafter.

\* \* \* \* \*

The historical setting of Montesquieu's theory need not occupy us long, although it invests the subject with more significance. France was a monarchy, in which authority was shared between an hereditary King and the *Parlements*. The *Parlements* were superior courts of justice with administrative functions, and they had the power to register, that is, officially to take cognisance of, royal decrees, as the basis of their judgements and executive acts, and to remonstrate with the Crown if such decrees, of general or fiscal nature, displeased them. The King and his friends insisted that the power of the *Parlements* was bestowed by, and held at, the royal grace ; the *Parlements* argued that their power was at least as old as the King's, having been derived from the original meetings of followers with elected chieftains on the *champs de mars* or *de mai*. No one knew or knows the real truth, as with any institutions which have invisibly added power to power in the course of a thousand years, and through vicissitudes during which other institutions have insensibly declined. Each of the pretenders caused its own history to be written, and it is enough that the *Parlements* were a check upon the Crown. The *Parlements* were not Parliaments ; that is, full legislative bodies with the power to propose, discuss and make laws ; or, as in England, openly to control the activities and purse of the executive. Nor were they popularly elected. They were, in the main, Courts of Justice, and controllers of certain aspects of administration, like the censorship, with powers of protest against the Crown's legislative activities, but without the power to ask for an account from the Crown's ministers. Moreover they were composed of judges, notaries and other officers who had purchased their offices.

Now these were the only barrier between monarchy in Montesquieu's sense, that is, the *moderate* rule of one, and despotism, or the reckless, wilful rule of one. They were not quite as liberal as Montesquieu, they were not specially competent, they were not representative by election, and they had no general community of interest with the people, not even with the general body of the third Estate. They were of the middle and the upper nobility—the Nobility of the Robe. But as men fully conscious of their worth, of their power, and of the need for a restraint upon despotism, and also as the natural representative of the upper strata of the Third Estate, whose members gravitated from their rich bourgeois commercial and industrial life into a powerful, brilliant, and respected profession, they, when fighting against the King, sometimes fought for the people, and at least promised the security and exemption from anxious uncertainty provided by a settled procedure based upon uniform, if not excellent, principles. Montesquieu's family was of the magistrature,<sup>1</sup> and he himself was presented with a 'parliamentary' living.

Searching for means to limit the Crown, to make a constitution, to build canals through which, but not over which, power should stream, to create 'intermediary bodies', to check and balance probable despotism, and not wishing to fly to the extreme of democracy, he saw great value in these *Parlements*, and especially defended the purchase and inheritance of offices, because they created a really independent body—independent in interest, not seeking to rise—but resolved upon its privileges. In these terms, also, did the magistracy defend themselves, liberally borrowing from Montesquieu when their privileges were attacked by Maupeou and Louis XV.<sup>2</sup> Montesquieu's spiritual need, his environment, and his travels and study in England, produced the solution we have just discussed. But a *threefold* separation was not essential to his plans; nor was he trying to discover scientifically the nature of each different power; nor did he define them once and for ever. As with all thinkers who are concerned to influence action, everything was grist to his mill, but the product was not of permanent value.

Indeed, we know that it was fostered by an inquiry into English Government in the middle of the eighteenth century, and tintured with Locke's theory of government; English Government seemed to Montesquieu to offer the guarantees of individual freedom, Locke was devoted thereto, and passage after passage of Locke and Montesquieu read word for word almost the same.<sup>3</sup>

Montesquieu follows Locke, but with more system, and it is impor-

<sup>1</sup> Sorel, *Montesquieu*, Paris, 1921.

<sup>2</sup> Cf. Lavissee, *Histoire de France . . . Jusqu'à la Révolution*, Vol. IX, Part I, Bk. I, Chap. I; Carcassonne, *Montesquieu et le problème de la Constitution française au XVIII<sup>e</sup> siècle*.

<sup>3</sup> *Esprit des Loix*, Bk. XI, 6.

tant to observe that he never thinks of a complete separation of powers, but rather to modify the concentration of powers. Moreover, to have insisted too emphatically upon complete separation would have meant, in his France, surgical action upon the Parliaments, similar to that undertaken on the County Quarter Sessions by the County Councils Act of 1888 in England and Wales: a severance of judicial from administrative functions. No. The executive convenes the legislature, states its duration, restrains its encroachments; it may veto legislation lest it be stripped of its prerogative. The legislature has the right of impeachment; 'if it has no power in a free state to stay the executive, it has the right and ought to have the means of examining in what manner its laws have been executed'.<sup>1</sup> It may not arraign the chief of state—but, 'as the person intrusted with the executive power cannot abuse it without bad counsellors, and such as have the laws as ministers, though the laws protect them as subjects, these men may be examined and punished'. He has thus not gone beyond the idea of impeachment to that of the political responsibility of ministers.

By the time Blackstone came to write his *Commentaries* the idea of the Separation of Powers had assumed an important place in constitutional theory all over Europe. His own views, summarizing the general belief that a 'mixed government', a 'balanced constitution' promote the liberty of the subject, are in terms almost an exact transcript of Montesquieu's.<sup>2</sup>

<sup>1</sup> Even that early confusion of Montesquieu's, that the powers were legislative, executive 'in respect to things dependent on the law of nations', and the executive in regard to matters that depend on the civil law—that appears in Locke's Chapter (XII) on the *Legislative, Executive and Federal Powers*. But it should be observed (1) that Locke does not include the judicial power as a separate authority; and (2) he gives a historical reason for the separation of executive and legislature, namely, that the legislature does not always sit, while laws need constant execution (para. 144). In that chapter also, it is said that 'because it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore . . . the legislative power is put into the hands of divers persons' . . .

Now, Locke, with his experience of English government, where the powers were not absolutely separated, did not create a theoretical system in which absolute separation appeared: on the contrary, he especially emphasized the importance of a certain co-ordination. For example, it is a trust held by the executive for the convenience of the people to convene the legislature; he should have a pardoning power; indeed, an undefined prerogative, 'a power to act according to discretion for the public good, without the prescription of the law and sometimes even against it', since not all contingencies can be provided against, nor all emergencies be met by an assembly of parliament.

<sup>2</sup> *Commentaries* (1765). Cf. also Paley, *Moral and Political Philosophy* (1785), IV, 7, and VI, 8.

Thomas Hearn, *A Short View of the Rise and Progress of Freedom in Modern Europe*, London, 1793, p. 105: 'In England I can forgive a man to be called a Duke or a

Now Montesquieu had laid weight upon institutions : but he had equally declared that these were only the product of a free and moderate spirit. The institutions, however, were crystallized in a book, and indiscriminately adulated by liberty lovers. The object is added, but people continue to adulate. Allowing twenty years for the general vulgarization of the *Esprit des Lois* it would be in 1768 or thereabouts that educated people were reading it as a conscious part of education. To people born soon after that time it would already be assuming the importance of a classic, without yet being left on the shelves as taken for granted. Small wonder that it had such an influence upon the Frenchmen of the Revolution, and the Fathers of the American Constitution. They seized upon the institutional arrangement, but did not, and could not, recapture the spirit which had brought it to Montesquieu's attention, and caused its creation in its native land, where it was supposed to work such daily wonders. Of this, more presently.

It seems to me that Montesquieu gazed upon his work and found it pretty rather than practicable. For he suddenly exclaims : ' These three powers (here he means only the two parts of the legislative plus the executive) should bring about a state of repose or inaction. But since, by the necessary movement of things, they are obliged to move, they will be forced to move in concert.'<sup>1</sup> That second sentence sounds like an improvisation which skips many difficulties to save the trouble of disturbing a handsome scheme. Every honest political scientist will admit such temptations ; and sometimes their very beauty utterly arrests thought. Let us observe that Montesquieu has avoided the problem of whether the speed and the direction of governmental movement will be appropriate to the needs of society. Nor does he explain exactly how the harmony among the powers, admittedly so necessary, will be produced. Perhaps the small amount of creative governmental work of his time in comparison with our own, did not raise these problems ; and certainly he was a supporter of free industry and commerce. If that is a good excuse for his failure, it is also one for treating it very critically in relation to our time ; for it drew the United States into a system of government, of which one may say at the best that the people are happy in spite of it, and it has produced a crop of erroneous theories in relation to other countries. One thing we may add to palliate that abdication of Montesquieu's : at any rate he recognizes that government must act ' by the necessary movement of things '.

Lord, on the idea that he cannot seize upon my ass or my ox . . . that the courts of justice are independent, and afford every redress which a virtuous and respectable citizen can challenge from the free suffrage of his equals, and the unprejudiced opinion of his country—that his own house is his castle, and the *Habeas Corpus* a security for the inviolability of his personal liberty.'

<sup>1</sup> Bk. XI, 6.



**The United States of America.** We shall never know whether the Fathers of the American Constitution established the separation of powers from the influence of the theory, or to safeguard liberty and property. They positively desired liberty in the sense enunciated by Montesquieu, and limits upon despotism; certainly they were permeated by his theory, and just as certainly property played a greater rôle with them than it did to the more spiritual and moderate Montesquieu, who had conceived of political well-being as based upon equal properties of small dimensions, used frugally. Whatever the respective weights of the influence of the anti-democratic and anti-despotic tendencies in the Philadelphia Convention, the American Constitution was consciously and elaborately made an essay in the separation of powers, and is to-day the most important polity which operates upon that principle.

As we shall presently indicate, the American Constitution did not generally declare that powers ought to be separate, it had not, in the American phrase, a 'distributing clause',<sup>1</sup> nor did it produce a clean severance, for that would have been to make government impossible. However, the Constitution succeeded in making government next to impossible, by certain internal checks and balances. The demands of those who believed they saw in the Constitution the rise of a new despotism called forth a famous reply from James Madison, which we must analyse.<sup>2</sup> He pays his tribute to Montesquieu, 'the oracle who is always consulted and cited on this subject', and then observes that in numerous and important ways, the departments of government in the British Constitution are by Montesquieu's 'standard' not totally separate and distinct from each other, and concludes that a partial agency was permissible and not subversive of liberty, though a concentration of power in one body was. That 'power is of an encroaching nature' was admitted: but in the present case was not the legislature to be more feared than the executive? In fact 'the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex'.<sup>3</sup> This is where the shoe pinched in the American States: this should be the object of fear and control; for a representative body can feel the passions which actuate a multitude and is small enough to be able rationally to make the plans to satisfy those pas-

<sup>1</sup> As was done in some State constitutions of the time—for example, Maryland, Virginia, Massachusetts, New Hampshire. Cf. Massachusetts Constitution of 1780, Art. XXX: 'In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the legislative and executive powers or either of them: to the end it may be a government of laws and not of men.'

<sup>2</sup> *The Federalist*, XLVII.

<sup>3</sup> This was a general complaint of the time in America. Cf. Chapter on the American Presidency, *infra*.

sions.<sup>1</sup> The other powers, the executive and judiciary, can by their nature be carefully described : not so the legislature : for who can precisely define legislation ? Further, legislatures can acquire power over executive officials through their powers of the purse. Proofs are given from a number of States.<sup>2</sup> Thus, there must be real, as distinct from mere paper, checks upon encroachment. What can these be ? Jefferson suggests an appeal to the people when any two of the three branches consider that there is need to correct a breach of the constitution. Madison, however, fears that frequent appeals to the people to correct defects in government must deprive it of veneration and stability, that ordinarily men acting in large masses will cause ignorant prejudices to rule, that the public tranquillity would too often be disturbed and, finally, that the legislature would triumph in all contests by the same influences which won them their election.

What then ? What expedient can be devised to maintain, in practice, the necessary partition of power among the several departments ?

'The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may by their mutual relations, be the means of keeping each other in their proper place.'<sup>3</sup>

The principle to be followed is to contrive that 'each department should have a will of its own'. From this it follows that the members of each should have as little agency as possible in the appointment of members of the others. But this cannot be pressed too far, otherwise the end will be appointment by the people, manifestly bad in the case of judges, who, in any case, became independent by their permanent tenure. This, however, is a secondary matter.

The principal means against the concentration of powers, is to provide the constitutional means and the personal motive necessary to each department's self-defence. The truth may grieve, but the truth is that ambition inexorably threatens. Nor can mere popular control suffice.<sup>4</sup>

<sup>1</sup> Cf. *The Federalist*, XLVII (Everyman Ed.), p. 253 : 'But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power ; and where the legislative power is exercised by an assembly which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength ; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes ; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.'

<sup>2</sup> *Ibid.*, pp. 254-6.

<sup>3</sup> *Ibid.*, LI.

<sup>4</sup> *Ibid.*, p. 264 : 'Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature ? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.'

'In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defects of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over public rights!'<sup>1</sup>

You cannot give each department an *equal* power of self-defence. As the legislative authority predominates, divide it, give the two chambers different modes of election and different principles of action! Give the Executive a negative on the legislature, but not an *absolute* negative! It must be remembered also that in a Federal government the associated governments control each other. More, a popular suffrage combined with the vast extent and varied range of the territory of the United States provided that different interests shall check each other, and prevent the easy formation of a homogeneous, and hence, a tyrannical majority.

'In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and people comprehended under the same government.'<sup>2</sup>

Madison's argument has been proved true by the experience of the United States. Only one doubt arises: whether it has not proved to be too true; for it has, indeed, thrown government into alternating conditions of coma and convulsion. *It is possible to have so many and various interests included in a single state that a majority can never be obtained, while forceful and cunning minorities always rule.*

Powers were thus distributed in the Federal Constitution: legislative powers ('herein enumerated') were vested in Congress,<sup>3</sup> the executive power in the President,<sup>4</sup> and the judicial in the courts.<sup>5</sup> The legislature was divided into two bodies, each elected for different periods, and by different modes: the first having a biennial tenure with complete renewal, the second six-yearly tenure with partial

<sup>1</sup> *The Federalist*, LI, p. 265.

<sup>2</sup> *Ibid.*, p. 267: 'In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself.'

<sup>3</sup> Art. I, Sect. 1.

<sup>4</sup> Art. II, Sect. 1.

<sup>5</sup> Art. III, Sect. 1.

renewals every two years. Their powers are different and check each other. The executive was to be neither dependent upon the legislature; nor upon the people, nor fortified by popular election : hence a special electoral college was created. His own sphere was not to be his alone, for the Fathers feared the Executive, especially a *National Executive*. Hence, the power of appointment of the chief officials was to be shared by President and Senate. Nor was the Executive to have a free hand in treaty-making, hence the assent of the Senate was required thereto. War and peace were to be declared by Congress. Officers with a place of profit under the U.S. government were excluded from membership of Congress; and though the President may read messages on the state of the Union in Congress, and though he may appoint officers who may act as a cabinet to him,<sup>1</sup> neither he nor they may, by a convention of the Constitution, appear on the floor of Congress.

Not all the objects which the Fathers had in view have been realized, but their main intention, effectively to separate the powers, has been achieved. For they destroyed the concert of leadership in government, which seems so important in an age of ministrant politics. They separated the executive sources of knowledge from the legislative centre of their application; severed the connexion between those who ask for supplies and those who have the power to grant them; introduced the continuous possibility of contest between two legislative branches; created in each the necessity for separate leadership in their separate business, and made this independent of the existence and functions of the executive. Parliamentary procedure has come to differ essentially from that in England; financial procedure is worlds apart; there is no co-ordination of political energy or responsibility, but each branch has its own derivation and its morsel of responsibility. All is designed to check the majority, and the end is achieved. At what cost? This we shall calculate, but not, unfortunately, in dollars, in the later discussions of the several institutions.

The principal point to observe here, however, is this, that as the demands upon governmental machinery have changed since the end of the eighteenth century—and we have amply analysed and accounted for that change—majorities instead of being detestable have become essential. As Montesquieu said: ‘These three powers should bring about a state of repose or inaction. But since, by the necessary movement of things, they are obliged to move, they will be forced to move in concert.’ The necessary movement of things in the U.S.A. has obliged the three powers to move; they cannot but move in concert since men abhor discord; and if concert cannot be obtained within the constitution it must—if movement is *really* necessary—

<sup>1</sup> Art. II, Sect. 2.

be obtained by something outside it, whether with complete or partial success. The indispensable institution has been found in the Party System. That has tended to redistribute the authority divided by the constitution. Of its success and failure we speak later.

The American system, which has been called 'Congressional' Government, is in very strong contrast to European democratic systems, which have tacitly rejected the separation of powers, and indeed, deliberately co-ordinated them, in the 'Cabinet System'. Briefly, the elements of the system are these. Functions are broadly divided between legislative, executive and judiciary. The judiciary is appointed, even as in the U.S.A., by the executive, but on terms which render it practically an independent branch. The executive then falls into two parts—the Ministerial or Cabinet Council, and the Crown or the Presidency of the State. The latter has little independent political power. The Cabinet is the creature of the legislature, but a creature which leads, nay, drives, its creator. It is not forbidden, but on the contrary is expected, to enter the legislature, and is often commanded to do so. There is thus a direct link between people, legislature and executive: and as a rule they act in general unison, moved by the same tide of political feeling. The legislature is responsible to the people, the Cabinet is responsible to the legislature and to the people. They are one body at different stages of leadership: but in the straight line of ascent from the people. In the U.S.A. popular sovereignty operates by bifurcation and even trifurcation: it divides into channels which run parallel to each other but do not meet or mingle.

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Yet the Continent and England have not been and are not without an interest in the Separation of Powers. The theory began in France and we can show that though Rousseau moved the French towards revolution Montesquieu governed the elaboration of its early constitutions.<sup>1</sup> The French National Assembly of 1789 laid down the principle,<sup>2</sup> and divided the legislative from the executive power.<sup>3</sup> No compromises were permitted,<sup>4</sup> the decree-making power was refused to the executive—and it was resolved that no member of the National Assembly or future Parliaments should be made a minister within four years of the termination of his membership, nor accept any office, gift, pension, salary or commission from the executive. We need not, however, trace all the consequences of the principle in these constitutions. They broke down in 1793 before the onslaught of passionate revolutionary zeal which could not do its work quietly without a central control of all powers in the capital and at the extremities, were readmitted in 1795, fell at Napoleon's touch and

<sup>1</sup> Cf. Redslob, *Le Régime Parlementaire*.

<sup>2</sup> 1791, Art. III, 3, 4.

<sup>3</sup> See Chap. VII, *infra*.

<sup>4</sup> Arts. III, IV, VI, Sect. 1.

were resuscitated in different forms in 1816, in 1830, in 1848, but not in 1875. But the revolutionary belief in the separation of powers has had one enduring result upon France—it caused her to deny, in her constitutions, the power of the courts of Justice to declare a law made by the Chambers constitutionally invalid, and the power of the court to judge executive officials for a fault committed in and by reason of the public service; and the latter led directly to the creation of special administrative courts for such cases.<sup>1</sup> Somewhat similarly in Germany; but quite otherwise in England.

Throughout the nineteenth century, there were those who argued that without the separation of powers there was no liberty. The clauses of the constitution are not important to us, except that we may remember that in the Constitution of 1875 the principle was no longer declared, and that in fact, that Constitution adopted the Cabinet system. The reason why the separation of power was in various ways laid down until 1875, and the reasons why it is still demanded by some writers are, however, important. It is not that there was or is any special interest in the possibility of exactly and scientifically defining and severing the elements of governmental power. This occupation was strictly subordinate to the essential object: to secure such a balance and direction of governmental energies as comported with their social ideals. For let us be clear about one thing, the theories of separation of power are ultimately instrumental to some particular design, the purpose of an individual reformer or of interested groups or classes.<sup>2</sup>

<sup>1</sup> Cf. Chap. VII *infra*, and Vol. II, Chap. XXV.

<sup>2</sup> Without any attempt to be exhaustive, we may observe the operation of such designs. Royer-Collard, the first considerable theorist since the Revolution, had good cause to hate the despotism of the people, and, hence, despotism of any sort. He taught an *ensemble* of powers checking and balancing each other. Sovereignty resides in the mass of political authorities, the Crown, the peers, the elected chambers. In no single one of these, but in all together. Parliament may withhold supplies; but ought not to usurp executive functions whose virtue resides in speed, secrecy, and continuity of resolution. Those powers should rule reasonably, for the Chambers, elected and appointed by interests, the property qualification of which would necessarily produce reason, and the rest need not be vouched for. But in order that *reason* might operate creatively against the will of any destructive authority, there must be freedom of opinion, and this is only attainable with an independent judiciary. Here is the city of refuge of men's rights. But the judges cannot be impartial unless they are immovable. Only if their tenure is permanent can they fearlessly vindicate the charter even against those who appointed them. Next, Benjamin Constant denied that the State exists to produce equality. Its purpose is political liberty and he is a supporter of the economic doctrines of Adam Smith and J. B. Say, seeing in individual initiative the only progressive force. Hence, at once, a separation of powers! Not of three, but of five powers: the royal power, the executive, that is the Ministers, and representative body of two chambers, hereditary and elected, and the judiciary. All rested upon his passionate belief in the value of liberty and this he defined in a fashion which deserves perpetuation, in his own positive terms, and also by comparison with liberty in the ancient world, and he is able to draw the conclusion that the principal difference is that in the ancient world all rights were a gift of the community, whereas modern liberty is independent of the State in many aspects of private life. This is very reminiscent of a distinction which was made

In France the idea of the separation of powers was soon used as a defence of the libertarians against the egalitarians. The difference between the consequences of the principle of liberty and of equalization forms the almost deliberate thesis of De Tocqueville's political philosophy. Considering democracy in America he is tempted to this reflection: 'Men desired to be free in order to be able to make themselves equal, and, in proportion as equality established itself with the aid of liberty, it made liberty more difficult for them.' For equality being their *principal* care they allowed the State to aggrandize itself, and men permitted their own degradation. How terrible the possible despotism! <sup>1</sup> . . . Now, more than ever, is liberty the salvation of society,<sup>2</sup> not to destroy the democracy which reposes upon equality, for that is obviously the fulfilment of God's design, but to temper it, to make it a beneficent and not a fatal dispensation.<sup>3</sup> How secure liberty? Through parliament, liberty of the press, education, judicial independence, the recognition and guarantee of individual rights and local and cultural corporations—institutions which will do in democracies what certain historical corporations had done in the old monarchy.

Nor has this strain disappeared from French political thought. The separation of powers is demanded as a check upon the usurping tendencies of the parliamentary assemblies <sup>4</sup> which threaten both executive and society, but the arrangement is not now always called either independence or separation, but *reciprocity*. There is obviously a desire to exalt the executive in order to stay the equalitarian legislation of the Chambers. To another writer <sup>5</sup> the problem appeared as that of the individual against the State . . . 'that is to say the

by Montesquieu and which merits present indication. Montesquieu observed that some constitutions are free, that is, made by the people, but that under these freedom is not enjoyed; or in other words, that there is neither provision for nor practice of, moderation: while, in others, the constitution is not free, that is, it may be on an hereditary basis, and a monarchy, and yet its spirit and internal institutions produce liberty. Thus to Constant, ancient liberty was participation in sovereignty, and it might mean subjection; modern liberty allows of individual exemption, but not always or necessarily sovereignty. Nor is it impertinent to add that Constant's ultimate conviction appeared to be not happiness but perfection in self-development, for the happiness principle, like the equality principle, is apt to venerate the concentration of governmental powers as in Rousseau, as instrumental to its achievement.

<sup>1</sup> Cf. De Tocqueville, *Democracy in America*, trans. by H. Reeve, 2 vols., London, 1889; Vol. I, Chap. XVI, p. 275; and Vol. II, Bk. IV.

<sup>2</sup> *Ibid.*, II, 301.

<sup>3</sup> *Ibid.*, Preface. Cf. also in Ruggiero, *The History of European Liberalism*, 1927, p. 197: 'I do not believe,' he said, 'that the real love of liberty ever arises from the consideration of material benefits, which often rather obscures it. That which has at all times won the hearts of a few for the cause of liberty is its own attractions, its own *charme*, apart from its benefits: the pleasure of being able to speak, to act, to breathe, without restriction, under the sole government of God and the laws. Any one who seeks in liberty something other than this is born for slavery.'

<sup>4</sup> Leyret, *Le Gouvernement et le Parlement*, 1918; *Le Président de la République*, 1913.

<sup>5</sup> Benoist, *La Réforme parlementaire*, 1902, p. 201.

great question of liberty itself', and the solution, at once the abolition of executive and legislative influence in the administration of justice, and the establishment of judicial control of the constitutionality of laws and administration on the American model, is reiterated after twenty-five years' experience of French politics.<sup>1</sup> Another, who is but a single example of many, deplores '*parlementocratie*', and the 'confusion of powers'—and this is because parliamentary powers and behaviour are feared as 'anarchic', while the non-existence of a popularly elected executive offers no check to the 'fatal enslavement of the people to the assemblies'.<sup>2</sup> What is behind this? We once more come upon the hostility between economic equality and political liberty.

'Nothing is more contrary to the spirit of the French Revolution, to the unanimous conception of the Republic, from its origin down to the recent times, when the retrograde spirit of Socialism commenced to pervert and ruin it, to substitute for the noble and fecund principle of liberty, of initiative, of individual responsibility, a truly collectivist regime, in anticipation of an absolute collectivist despotism which draws near.'<sup>3</sup>

It is not necessary to multiply examples. The facts are clear. Numbers of people and political parties<sup>4</sup> are afraid that without checks and balances in government liberty will disappear. A similar development is apparent in German constitutional history,<sup>5</sup> and in English.<sup>6</sup> What caused the creation of the theory and the political demand? In every case there is a specific reason or group of reasons for fearing the intervention of government. Up to and in the eighteenth century it was fear of monarchical despotism, by the upper and lower classes, in the nineteenth century it was for the same classes in Germany the only hope of fettering absolute monarchy, in all countries to-day it is the desire of the economically well-off classes to preserve themselves against the collectivist and egalitarian tendency of democracy, and of the more patient, bourgeois working-class leaders to attempt a synthesis of the liberal with the Socialistic state. They desire at once dissociation from the State, and an ordered regular procedure for the determination of the extent of their political obligations, whether merely imposed by the State or self-acknowledged.

But there is no such enthusiasm for checks and balances among those who are impatient to create a new social order, or sternly to maintain an old one, where, for example, the courts of justice show themselves imbued with a spirit of opposition to the executive. For example, the Bolshevik theory confounds all powers; so equally does

<sup>1</sup> Benoist, *Les Lois de la politique française*, Paris, 1927.

<sup>2</sup> Jules Roche, *Quand serons nous en République?* Paris, 1918.

<sup>3</sup> *Ibid.*, p. 197.

<sup>4</sup> These, to-day, on the conservative wing.

<sup>5</sup> Cf. Ruggiero, *op. cit.*, p. 251 ff.

<sup>6</sup> The history has not been written yet, but the works cited in the discussion in Chapter XXXV, and in Chapter VII on Constitutions, indicate the stages.



the Fascist system. Royalists like de Bonald, and the German Romanticists, expected all powers to march together, and the German constitutional theorists of the Empire of 1871, though they were jurists by training and profession, managed to discover arguments against the notion of the separation of powers. There is, without any doubt, a connexion, and a pretty strong one, between the economic and social status of the writer's group and his theories. Some people attempt to escape governmental control, and therefore demand the accumulation of courts of appeal of all kinds before they can be seized. Others needing the help of government, can prove from that hypothesis that there ought not be any scruples about swift and immediate action. All depends upon what kind of moral sovereign good is worshipped. It is not necessary for the political scientist to have inquired into the separation of powers further than to have arrived at this result: whether we wish a separation of powers, and in what particular institutional form it is to be embodied, depends upon what general political *needs* we feel to be really urgent. That is to say, there is nothing absolutely inherent in the nature of different functions, nothing eternal and unchangeable, which will settle the question whether there ought to be a separation of powers, and if so in what it should consist. The answer is relative to one's needs, and to the organization, procedure and mentality of the institutions as they actually function.

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We cannot, however, leave the subject at this point, for there are two questions to consider. The first is the possibility of separating powers distinctly by reference to their specific qualities, and the second is, how are powers actually differentiated—not separated!—in modern democracies?

**The Fall of the Three Powers.** I will not answer the first question by detailed examination of the old triad of powers. In recent years the triad has been much attacked by theoretical writers, and has been proved by actual experience to be impossible.<sup>1</sup> It has been shown, broadly, that the legislature does not always concern itself with the making of formal rules, but often makes exceedingly detailed and specific rules concerning departmental and local organization and functions, and thus performs works to which only the technical knowledge of professional civil servants is adequate. Again, it is shown that the legislative body allows more and more scope to the executive to fill in great empty areas in the statutes, and that this rule-making is no more nor less than 'secondary' or 'subordinate' legislation: that is, general rules with the supreme binding authority of statute. Moreover, these departments are given judicial powers

<sup>1</sup> e.g. Bondy, *Separation des Pouvoirs*, and Fairlie, *The Separation of Powers* (Michigan Law Review).

by statute—powers to judge of complicated situations of fact and public policy as they concern individuals and associations; from which there may or may not be appeal to the law courts. And, finally, the law courts add to or take away from the statutory law, or from executive power, by their judgements. The analyses have proceeded to considerable depth and we need not reproduce them.

The principal criterion is regarding the danger to individual liberty of allowing an administrative system—the servants of the Chief Executive—to undertake the functions of law-making and the administration of justice. That is the sum and substance of the modern interest in the Supremacy of Law, and Administrative Law, and it is a direct consequence of the development of State activity since the 'seventies. Originally the despotism of the Crown was feared and attacked: later the despotism of Parliament was feared and attacked: now, in the twentieth century, the alleged enemy is the great corps of Civil Servants.

There is no longer any virtue in the triad, except as a provisional scheme. We must discover some other rough differentiation of the functions and organs of government. When we have done that we might inquire briefly into their nature and the extent to which modern policy demands their interaction. Let us always remember, also, that the political utility of any power, legislative, or executive, or judicial, does not depend upon its own nature, but upon the mentality and procedure of the body which exercises it.

#### TOWARDS A SCIENTIFIC UNDERSTANDING OF POWERS

If we observe the operation of modern Government, regardless of any division of powers among different organs at all, we see that to a complete act of government two things are necessary: to resolve and to execute; that is, to determine that certain things shall be done and then to cause people to do them. If we apply this division to political activity we see that under the first, the resolving branch, its centres are the Electorate, the Political Parties, Parliament, the Cabinet and the Chief of State; and under the second, the executive branch, the Cabinet, the Chief of State, the Civil Service and the Courts of Justice. That is to say, there are seven main centres of political activity, the co-operation of which is necessary to produce a complete act of government. The seven are, in practice, interlocking and essential to each other, though there may be jealousy and distrust among their actual personnel. Without the Parties, the Electorate would be a mass of men and women in a nasty State of Nature, though I am far from saying that even with them the Electorate is in any country as yet much beyond it. The Electorate has its contact with Parliament through the constituencies, by-elections, lobbyists and deputations. Parliaments to-day are little more than

the Political Parties in conference specially organized by Party Meetings and the Whips. The Cabinet is, on the resolving side, interlocked with the Electorate, with the Parties and with Parliament, and obtains from the Civil Servants the expert material for initiating or handling discussions and resolutions. On the executive side, it is in touch with the Chief of State, controls, and is guided by, the professional administrators, and appoints the judges of the law courts, having, also, its own legal counsel from Bar and Bench. The Chief of State is (with the exception of Great Britain) in touch with the electorate, being elected directly, or by Parliament. The Civil Service is not entirely out of touch with the public: it is reached by deputations, and aided by consultations and advisory councils. The Courts of Law are not entirely out of touch with the development of civilized needs, and for a very large part of their time apply laws made by the factors we have already indicated; yet they also exercise a moderating effect upon the law, because they apply certain extra-statutory principles, substantive and interpretary. In practice, the interlocking relationship we have sketched is even closer than indicated; but these are the main elements which co-operate in government.

Where any person chooses to place the preponderance of power, the initiative or the veto, whether he desires to see these factors moved by a uniform principle and tendency, or desires stultification, depends upon what combination will best serve his scheme of political values. History shows quite clearly that men have, in their own day, made definite judgements, some for their immediate satisfaction, some with the purpose also of providing for future generations, some thinking mainly of economic advantages, others, like De Tocqueville, rather of spiritual satisfactions. There is not, there never was, any *necessary* choice between these various elements. The choice is peculiar to the time and the men—and more, to the variety of activities undertaken by the State. Nor have the powers and organs of which we talk always possessed a uniform, unchanging character, though they may have borne the same name. The people were once brutal and ignorant in the extreme; Courts of Justice have been venal and unenlightened; Kings and Courts good and bad, able and inept, noble and vicious; administrators have at times been truly helpful and civil, and at other times tyrannical. Further, each of these powers was moulded in its own special time, and not in deliberate relation to the others, and upon new theories and emergencies which have not necessarily concerned or applied to the rest. It is an error to imagine that the powers of government have ever been mutually adjusted in a rational scheme made at any one time. The powers are the result of battles and accidents, as well as of rational forethought, nor has their organization caught up with the pioneers of political science. Let us sketch

and comment—very broadly, for the detailed treatment comes later—upon the quality of the powers we have differentiated.

**1. The Electorate.** This is an amalgam of individuals and groups, a seething mass of unco-ordinated and often hostile wants. It is now recognized as the sovereign body in most constitutions and political theories ; some deny that it ought to have moral limits, while others, and these, the minority, urge that it ought not to be despotic, and they demand its self-limitation by reference to some moral standard. Whatever the literary theory of popular sovereignty, the power of the people is, in fact, limited by their ignorance, their moral conventions, their monetary resources, the constitutional forms through which they are led to operate, institutions which were established before the advent of its authority, and which retain important vestiges of former power. It is idle to speculate upon what this power—the Electorate—would be without restraint and the existence of Party Organization to lead, educate and control it. This, however, is certain : democracy would be either impotent or destructive, and by destructive I mean that it would force men and things to actions which would cause their breakdown, so that not only would the object not be obtained, but the energies and powers would be dissipated : the usual fate of ignorant attempts to use a complex machine. If we reflect upon the intricacy and world-wide range of modern government, domestic and international, we can understand at once that even the present amount of common sense and education in the majority, and even the present state of morality, including such things as popular notions of justice, decency, and prudence, need a remarkably long, careful and intensive cultivation before the people will be able to do more than choose between two or three broad alternatives put before them in the form of party candidates. The daemonic mightiness of the Sovereign People, combined with the relative incompetence of mere men and women, leads those who care for equity, order and certainty, to require specialized and skilled institutions to obstruct and sift the awful avalanche of its intentions. None more than the people themselves desires this, though they have to be flattered into the belief that they are all-powerful and all-wise.

**2. Party and Parliament.** The institution most immediately and continuously in contact with the people is the Party. Its function is the organization of the voters in the hope of a majority, or at least of formidable opposition, and to control the creation and execution of policy, principally through Parliament. Competition between parties already imposes upon them a certain amount of discipline and training for their task. In proportion as the plenitude of sovereignty is open to their acquisition, each vote is of supreme importance, none can be ignored, and, in the long run, to secure votes they must show achievement. Conflict and contact with other parties fosters a know-

ledge of others and reveals one's self. Some technical knowledge of the whole field of government must be obtained. It is impossible to distort the truth either as to past services or future promises beyond certain bounds, for fear of public exposure. Reciprocity in debate leads to settled and rational rules of procedure. Corporate life and personal contacts in an assembly produce a conciliatory attitude, and this is fostered by the traditions and usages of the assembly. The payment of members has made it possible for the less acquisitive to devote themselves entirely to their parliamentary duties. All these things promote party and parliamentary competence, and rational, considerate and even tolerant, principles.

Yet parties and parliaments are still in their infancy, and they have not yet solved all those difficulties which now prevent them from being the proper centre of all law and administration. The process of election depends upon the people, and despite the rivalry of the parties, which tends to lift the level of candidates, we are still far from a satisfactory solution of the main problem: to provide wise and competent representatives in a sufficient number, and with sufficient time to fulfil their function as its technique demands. We have but said that *within* the electoral process of competition, there are advantages obtainable by the operation of the Party and the Parliamentary system, but the level of the electorate and of the bulk of the members of different parties may cause, and in modern states in varying degrees, does cause, such imperfections in the legislative body, that if even another straw were put upon its back, disaster would follow, certainly and swiftly.

What the elected representatives of the people might do, or ought to do, depends very largely upon what they can do. To judge them now, and for a generation hence, they can no more than legislate by stating their personal, group and local opinions of the projects of their leaders. Neither they nor their leaders are able to make the technical calculations and surveys upon which bills are founded, nor are they able to throw the bill into the form which will express their intentions with the least vagueness, having regard to the trouble which would follow if the clauses were not phrased conformably to other laws and meanings already accepted by the courts and in common transactions. Nor, if the repeal of other laws is consequent upon the new statute, do members know enough about either the Statute Book or the state of the law as made and administered in the Courts, or by the Administration, to be able to act without skilled guidance. Further, representatives may inquire into administration: the function is important and possible, and one, furthermore, which can be with advantage extended beyond present limits, for to question is to alarm, and to alarm is to control and reform. They may educate the public by their debates, and express the doubts and aspirations

of all interests. All this, however, can only be done generally : for time is pressing, and numbers, for the sake of reasonable discussion in a full assembly, must be small. It is quite certain that when it comes to the constant and daily application of these general rules and intentions to a multitude of objects and citizens, the member has neither the necessary time, technique, patience, application nor interest. Some other bodies must assist until such time as the legislature is appropriately constituted.

**3. The Cabinet.** The first of these is the Cabinet, that is to say, a small number of people, usually members of the legislative assembly, the leaders of the majority party or parties, acting as the supreme chiefs of the various administrative departments. It is at this point that the legislature comes into direct contact with the administration and with the law courts, exerting its guiding and creative influence freely upon the one, and in a much lesser degree upon the other, superintending the conversion of laws into behaviour in accordance with the wish of the majority, and using the administration as aid and counsel in the technical preparation of policy for introduction, explanation and defence before Parliament and the country. Through this body Parliament and the Electorate are improved by expert knowledge, and the permanent officials are vitalized and controlled.

**4. The Administration and the Courts of Justice.** On the other side of the Cabinet looms the vast apparatus of administration, the machine for the concrete application of general principles to particular cases. *There is nothing in its nature which demands that it shall be divided into several departments, or between the centres and the localities, or let us say, between Departments and Law Courts—nothing at all, except considerations of utility depending upon the nature of the various subjects of administration, and the character of men's desires.* Did we not observe that Locke's division of power was into legislative, executive, federative, the last being but executive action in foreign relations? This division was confusedly followed by Montesquieu, and the cause of his confusion was this, that he *wished* the Law Courts, much as he saw them in contemporary England and in France, to be bodies independent of the executive. Montesquieu's wish, however, cannot be our law, unless we find it convenient and proper for our own purposes. In fact, we see that the executive work of the State is divided broadly into the administrative and the judicial, but in no country was this (until the end of the eighteenth century in France and Prussia) the result of a conscious and systematic separation. Our present institutions are the result of certain historical disputes about political power, in which the parties who wished to limit autocracy were able to secure, mainly by force or its threat, the creation of a special council of deliberation and resolution (the legislature) on a representative basis, and secondly, a special branch-

office to state the law when its meaning was vague or in dispute between individual and individual, and between individuals and the Crown. What was done is what some modern reformers wish to do : to institute special boards of appeal to whom they may turn when they are troubled by the State (or other people), and likely to be favourable to their claims, by virtue of their mentality, their deliberately designed opposition, their corporate conceit, and their forms of procedure. This was all the more necessary since the law is a special study, peculiarly difficult in the ages when practically all was customary law. We know why the executive grew so strong in the sixteenth century ; men could not do without its strength, but they attempted—at least the powerful attempted—to confine the executive to what was strictly necessary to its admitted function. They could not allow the claims of policy—the *raison d'état*—to a prerogative fitful, uncertain, secret. The executive must show due cause. How, and where ? The answer was : before judges who were free from royal control.

It is clear that the execution of law involves two duties : judging the facts of a situation, and judging the relationship to the law. But what if the law is vague ? Who shall judge between State and subject ? That is one difficulty. A second is that the greater part of the law is not concerned with the State as a party, either as a recipient of duties from its members or as a donor of benefits to them, but with judging the claims of individuals and groups against each other. This was by far the largest part of the early jurisdiction of the courts, and is even so to-day.

Now, by an historical development of amazing interest, but also so complex that we cannot follow it here, the Courts in England and America (but not to such a degree in France or Germany) attracted to themselves (1) all judgement between individual and individual, (2) crimes against the State, and (3) the judgements rendered by the Executive or by privileged corporations whenever these were challenged as outside their legal power. The Courts obtained the power to challenge and rectify such judgements. The English method became the Anglo-Saxon method, and even on the Continent, where the executive was much more resistant, and where the administration had its own final jurisdiction, the Courts of Justice went far towards securing an extensive supremacy. This development proceeded until the last three generations, when the State assumed positive services and consequent duties were demanded from its citizens.

Little by little the latent and essential contest between the two branches of administration was revealed, for while the strictly administrative branch sought speed and efficiency, the Courts were still the resorts of appeals, or the people—not yet having learnt the price

which duty must always pay for benefits—considered they should be. By the ‘necessary movement of things’ the Courts were reviewing administration, and the administration was sitting in judgement, and each became resentful of the other’s intrusion into a domain which had been existent long enough to be deemed ‘sacred’, or which was considered so necessary to social salvation as to be ‘holy’, while citizens were alternately terrified by stories of the ‘new bureaucracy’ or the ‘new despotism’, or ‘trial by Whitehall’, and exalted by such policies as the demolition of slums, the stamping out of contagious diseases, and the extension of social services at lower than cost price.

What, in essence, is the dispute? It is a dispute about the comparative governmental merits of administrative action and judicial action, and the comparison, in England and America, at any rate, is usually made between the worst administrative and the best judicial practices. That, however, is not a scientific treatment of the problem, which is: to compare the nature of the present work to be done and the best machinery which can be discovered to do it, and not to compare it simply with the machinery which has existed or now exists. Let us consider the two sorts of executive action as they now operate, and compare their merits and defects.

The Administrative Departments work within the broad limits set by Parliament, but these are to-day so broad that a large discretion resides in the Departments. They exert a mighty power, for often the only appeal which can be made against the decision of an official is to some higher official in the Department itself, where the case may not be fairly judged, or it is to the Courts, where the procedure may be so complicated and costly in money and time that it is cheaper to the complainant to suffer the wrong rather than seek the remedy. Or, again, a question might be asked in Parliament, but lack of time, and ministerial equivocation fertilized by departmental ingenuity, may cause the denial of justice. An unaccountable power may be an unnecessarily cruel power.

What contributes to the possibility of departmental injustice? First, the personal desire to dominate, since what is to be done is a personal duty of the office and officers, to be carried through successfully. Secondly, the career depends upon success or failure, not quite so often as in private industry, but to an extent which is important here. Thirdly, corporate defensiveness and sense of collegiality take away from the value of an appeal to a superior officer. Again, administration is *at present* a rather secret process, some things not being recorded at all, while other things are recorded but not published: hence decision may be arbitrary, and secrecy, in any case, produces a reputation for arbitrariness. Next, there is lacking a body of rules for training officials, and a code of duties and behaviour,



obligatory, certain, public and enforceable, to secure the proper poise between efficient innovation and scrupulous regard for the rights of individuals and groups. As we show in the section on Civil Service, not much has been done, in Anglo-Saxon countries at least, to think out and establish such a training and code. But those who sit in judgement, especially when there is no right of appeal, should be circumspect, wise, considerate, scrupulous in regard to every trifle of evidence, and personally disinterested, save to secure an equitable result as between complainants or defendants and the large body of citizens and social groups who, though they do not appear, are, in effect, the other party. Finally, the judgement is often not made by the person or persons who have conducted the investigation of the evidence, but by some other officer, upon report.

5. **The Courts of Justice.** These things the Courts of Law have in most cases been able to give, for their whole procedure has been built up on the basis of impartial umpireship between two parties. They have had no personal interest in the result, for they have been made irremovable, exempted from suit for any fault, there is little question of promotion, and the acceptance of gifts is forbidden.<sup>1</sup> Forms of procedure have been elaborated to make the discovery and presentation of all evidence fully possible, and to give all parties the opportunity of stating their case with expert help. Proceedings are public; reports are published; records are kept; and precedents have weight. Moreover, the principles of the law as they are taught, include these things; they are revered; and though (in the Anglo-Saxon countries) there is no special training for judge-ships, there is a special training in the law. In the use of this law for attack or defence, counsel comes before a court with strict etiquette and presided over by justices who jealously guard the traditional morals of the profession. These things produce definite principles, which all may know with considerable certainty, and

<sup>1</sup> Cf. *Federalist* (Hamilton), LXXVIII: 'If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachment, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. . . .

'That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. . . .

'There is yet a further and a weighty reason for the permanency of judicial offices; which is deducible from the qualifications they require. . . . There can be but few men in the society, who will have sufficient skill in the laws to qualify them for the station of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller, of those who unite the requisite integrity with the requisite knowledge. . . . A temporary duration in office . . . would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench' . . . etc., etc.

a process and convention of impartial and impersonal attention to the claims of the parties.<sup>1</sup>

When, however, the administration of justice is considered simply as a branch of government, these very advantages are observed to secrete certain disadvantages. The Courts move only as a remedial and not as a preventive machine, being concerned with cases when they arise and are presented, and not, with the wholesale calculation and independent prevention of future contingencies. Control of trusts in the U.S.A. was made innocuous by the attempt to administer it through the Courts. In the judicial process the initiative which sets the train for authoritative decision belongs to individuals, and may never come or may come too late ; in the administrative process it is vested in officers definitely charged with forethought. Secondly, in so far as 'public policy' is concerned, the Court of Law may not be able either to judge properly of the issues concerned, as they do not know the nature of various governmental factors involved, or are not equipped to measure the facts with the quantitative exactness necessary for certain decisions. Chief Justice Taft in the U.S.A. believed he could find a 'yardstick' to measure 'unfair' competition ; experience showed he was wrong.<sup>2</sup> Further, the method is not sufficiently elastic, for it is bound overmuch by precedent and the need for uniformity (to secure certainty) and so cannot meet every situation which confronts it with specific appropriateness and yet maintain its great virtue, namely, continuous uniformity and equality of application. Finally, the substance of the law administered by the Anglo-Saxon Courts, largely the Common Law, is the product of a bygone age, when society did, and needed to do, much less with and for the life of the individual than it does to-day. Almost, the Common Law was born to resist ; in the U.S.A. it was deliberately set above the Congress and Executive to resist ; it still resists. That

<sup>1</sup> Cf. Lord Chief Justice Hewart, *The New Despotism* (1929), p. 35 ff. : 'All that is involved and implied in the term "court" is essential. . . . The work of a Court involves many important ingredients, as for example, (1) that the judge is identified and is personally responsible for his decisions ; (2) that the case, subject to rare exceptions, is conducted in public ; (3) that the result is governed by the impartial application of principles which are known and established ; and (4) that all parties to the controversy are fully and fairly heard. In other words, the decision of a court is in every important respect sharply contrasted with the edict, however benevolent, of some hidden authority, however capable, depending upon a process of reasoning which is not stated and the enforcement of a scheme which is not explained. The administration of the law of the land in the ordinary courts presupposes, at least, personal responsibility, publicity, uniformity, and the hearing of the parties.'

<sup>2</sup> Cf. Dickinson, *Administrative Justice and the Supremacy of Law*, Cambridge, 1927, Chap. VIII, p. 238 : 'The difficulty is that, even in the case of common and familiar practices, a method which is unfair when attended by certain surrounding circumstances may be fair enough in others.' The general problems are illustrated in the following cases : *Federal Trade Commission v. Gratz, et al.*, 253, U.S. 421 (1920) ; *Federal Trade Commission v. Beechnut Packing Co.*, 257, U.S. 441 ; *Federal Trade Commission v. Sinclair Refining Co.*, 261, U.S. 463. See also Henderson, *The Federal Trade Commission*, New Haven, 1924 ; Stevens, *Unfair Competition*.

is precisely why it now meets with the favour of the groups who wish to be defended from the hand of the government.

\* \* \* \* \*

It is clear that neither of these forms of organization may be perfectly well adapted to its purpose ; but which, if either, is the better, and how either, or both, should be amended to accomplish the proper ends of government depends upon the nature of the task and of acknowledged social necessity. Some new form is undoubtedly required, even as for other disputed things to-day, the machinery of government requires amendment. What that form is, need not be discussed here, for such a discussion would involve inevitably the injection of my own views of the direction which government should take : it is enough that we have stated the issues ; and the subject is pursued further in the Chapter on *Legal Remedies against Public Administration* in Part VII.

From this study of the separation of powers, however, we have derived these conclusions : that the doctrine has ever been made to defend certain spiritual and material goods from the control of government ; that Montesquieu's division was but rough and depended largely on local and temporary circumstances ; that he himself realized that it could not be carried out with any exactness, and that such exact and distinct severance would mean entire inanition ; that all government is a single process, the division of which into parts, and their relative power, depends upon the purpose of government and the relative technical capacity of the various bodies of men and women who are employed in its realization. As we proceed further we shall see more clearly, because in more detail, the real nature of the various instruments of government. And first, of Constitutions.

## CHAPTER VII

### CONSTITUTIONS (THE INSTITUTIONAL FABRIC OF THE STATE)

THE State is a human grouping in which rules a certain power-relationship between its individual and associated constituents. This power-relationship is embodied in political institutions. The system of fundamental political institutions is the constitution. This definition leaves open the question of the form and substance of the constitution, and it is well that the question should be left open, for modern constitutions exhibit such a wide variety of forms, and so great a difference in their substance, that no definition of reasonable length can include the main facts.<sup>1</sup> The discussion is, for convenience, to hinge upon the two principal terms of the definition: System and Fundamental.

**System.**<sup>2</sup> The term system denotes that the fundamental political institutions are vitally connected with each other, and vitally related to the nature of the society in which they exist. As for their connexion, it is clear that each institution lends significance to its neighbours. Institutions are obliged to co-operate, and in the long run their jagged edges are worn down, until harmony prevails. What, for example, Parliament gains, it gains at the expense of the people, or the Executive or the Courts of Law; what the Civil Service gains perhaps parliamentary committees lose; what is taken from individual property may accrue to the social welfare; the institution which finally decides the appropriation of money goes far towards deciding the power of all others; where, as in the U.S.A., institutions are separated which, for effective operation, should be in close contact, the political party system secures value as a connecting link. Each part of a constitution, in short, must be read together with all the others if its real meaning is to be discovered: and all parts must, and do, in practice, have regard to each other in the course of operation. The human energy which

<sup>1</sup> Cf. Schmitt, *Verfassungslehre*, pp. 1-44, for a number of definitions.

<sup>2</sup> Cf. Bolingbroke, *On Parties*: 'By Constitution we mean, whenever we speak with Propriety and Exactness, that Assemblage of Laws, Institutions and Customs, derived from certain fix'd Principles of Reason . . . that compose the general System, according to which the Community hath agreed to be governed.'

floods into them and makes them move, abhors waste and little by little reduces it to a minimum, until they act as a system.

The fundamental political institutions are also a system in relation to their social environment. Every constitution is the product of the material and spiritual circumstances of its time; and though, in its narrowly formal aspects, like the British Constitution, it may be the product of an earlier time, or owing to the doctrinaire notions of some of its makers, like the German Constitution of 1919, seem to have application only to a possible or impossible future, its meaning in operation, as distinct from its meaning on paper, is fairly responsive to contemporary necessities. There is always an institutional lag in the State; it takes time, as we shall see, for institutions to overtake the necessity for them.<sup>1</sup> But sooner or later that which is wanted is made in proportion to the intensity of the want, and that which is no longer wanted is dropped, formally, or by simple disregard. That we learned, too, from a consideration of the conditions of State activity.

**Fundamental.** What is meant by fundamental? Is fundamentality a matter of detail or a question of which institutions to include? Is it enough to include the formal law-making, executive and judicial institutions and their relations with each other as in the French Constitution of 1875, or ought the recognition of Trade Unions to be included as in the German Constitution of 1919, or are they, as a very noble lord once said in the British House of Lords, only 'The Monarchy, the House of Lords, and the fox-hounds'? There is no definite point where fundamentality begins or ends, and we shall presently see how this varies from epoch to epoch and state to state. But all countries insist that there *are* fundamental institutions. They have made the word constitution or its equivalent. In Great Britain, at least since the seventeenth century, constitution has meant something more set and determined than ordinary law. In Germany, where *Gesetz* means law, emphasis is given to that which is even more basic, more 'set', by the words *Grundgesetz*,<sup>2</sup> the ground or basic law, or *Verfassung*, that which is set, grasps, holds together, causes coherence, *fastens*. Similar distinctions are observable in France (*loi*: constitution), and Italy (*legge*: statute). We will leave the meaning of fundamental to unravel itself, but before entering upon that stage we may ask why in general men seek to establish certain institutions as fundamental.

<sup>1</sup> I do not mean that the State is worse off in this respect than other human associations, than business for example. The narrow, mean and stupid conservation of some business men is notorious, and, for society, economically destructive.

<sup>2</sup> Cf. Schmitt, *op. cit.*, pp. 42-44. Cf. also Lassalle, *Über Verfassungswesen* (1863): *Reden und Schriften*, Edn. *Vorwärts*, I, 470 ff. Discussing the force of the term *Grundgesetz* he shows that its principal significance is that it is the *foundation* and that a foundation is based on *necessity*. 'In the conception of a foundation there is the idea of a concrete *necessity*, an operative power, *which of necessity makes that which it supports that which actually prevails.*'

They do so because they desire to reduce uncertainty to a minimum. The world is full of uncertainties, and to meet the problems which spring from them requires constant vigilance, constant effort. Physical and nervous strain are produced by uncertainty, and the more complex human environment and human relationships, the more the possible uncertainty, and, therefore, the more strain. It is a matter of course that human beings should attempt to reduce the uncertainties, especially in the arena where these may cause conflicts of a radical and painful kind, that is, in political life.<sup>1</sup> Your liberty, your property, your family, your religion, your town, province or country, the association of your fellow-workers—can these be put into daily jeopardy? It is enough, perhaps too much, in so short a lifetime of some sixty years, if they are endangered once or twice, but not to know from day to day or year to year, the conditions of your subordination or super-ordination in the community is intolerable. We need not even add to this simple human sentiment the consideration of the obligations imposed by modern economic technique, or the mass of anxieties already confronting the professional politicians and law-makers, to realize how important men feel it, that limits should be set to the changeableness of things, that stability be established. This becomes clear from a study of the form and substance of constitutions.

#### FORM OF THE CONSTITUTION

The chief problems arising out of the forms of constitutions are three: (i) whether they are written or unwritten; (ii) whether flexible or rigid and (iii) whether special arrangements secure their supremacy. Paramount over these technical questions is the essential one: what influence is exerted by these differences of form upon the political thought and behaviour of the State possessing them?

(i) **Written and Unwritten Constitutions.** The difference which has been paraded until the mind is tired of contemplating it, is that between Written and Unwritten constitutions, and the difference is illustrated by contrasting the conditions of almost the only country in the world with an unwritten constitution, Great Britain, with those pertaining in all other countries. What is this difference?

The fundamental political institutions of Great Britain, those in which the very life-sap of authority flows, are not set down in writing in any formally accepted document or documents. They are regulated by (1) judicial decisions, sometimes founded on ancient promises of Kings, or more or less vague 'immemorial rights and liberties' like freedom of public meeting, freedom of person and speech which are corollaries of ordinary common law rights, and agreements, resolutions and laws, made by rebellious Parliaments. The occasions have been conflicts for power, and concessions have been made or withheld by

<sup>1</sup> Cf. discussion of Order in Chap. IV, Para. III.

Kings according to their personal character or momentary administrative and fiscal difficulties.<sup>1</sup> Then (2) there is a number of statutes made with more deliberateness and wider participation (like the Act of Settlement, the Franchise Acts, the Parliament Act of 1911).<sup>2</sup> And (3) there is a series of understandings or 'conventions', political usages, of piecemeal growth, which regulate perhaps the most important part of the constitution—the sovereignty of Parliament, the responsibility of the Cabinet to Parliament and so to the people.<sup>3</sup>

Judicial decisions form a body of written constitutional law; the Statutes certainly do, and the utterances of Parliament on various supreme occasions are also authentically existent. These, taken together, are as explicit as, often more so, than the 'written' constitutions of other countries. But the 'conventions' are not so recorded by any institution with such authority as the Courts of Law or Parliament. Nevertheless, they are understood with fair exactness, and have been recorded by Ministers in their correspondence and political speeches, accepted with inappreciable dissent by politicians and scholars, and even written down in great detail by such authorities as Hearn, Bagehot, Dicey, May, and Anson.<sup>4</sup> Where, then, is the difference between the British 'unwritten' constitution and the 'written' constitution of other lands? The difference, I think, is twofold. The British constitution includes important sections—the conventions—which are taken for granted, but not formulated, save occasionally by individuals; and many of the fundamental institutions of the country, as, for example, Trade Unions and political parties, free public education, and religious freedom, which are formally included in the constitutions of other countries, are not included. The more important is, that no body of people were deliberately called together and entrusted with the establishment of a constitution as in other countries. Everywhere else there have been Constituent Assemblies or Conventions:<sup>5</sup> but England has never possessed a formal *pouvoir constituant* other than the ordinary legislature and executive. In England the constitution has not been the work of a specially designated body, but the incidental secretion of institutions bent, casually, on the righting of particular wrongs. At a point of time when a settled and deliberately planned constitution was appropriate, that is, after events had

<sup>1</sup> e.g. *Magna Carta*; cf. W. S. McKechnie, *Magna Carta*.

<sup>2</sup> Other examples are the Habeas Corpus Acts, The Bill of Rights, the Re-election of Ministers Act (1919), etc. Cf. for long lists such text-books as Chalmers and Asquith, and Wade and Phillips, *Constitutional Law*.

<sup>3</sup> Cf. Dicey, *The Law of the Constitution*, 8th Edition, London, 1927, p. 23: 'The other set of rules consists of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all, since they are not enforced by the Courts.'

<sup>4</sup> Cf. for example the position of the Cabinet and the Crown, Part VI *infra*.

<sup>5</sup> Cf. Borgeaud, *op. cit.*; Jameson, *Constitutional Conventions* (4th Edition, Chicago, 1887).

made possible the execution of Charles I, there was not a sufficient consensus of opinion in the country to permit the establishment of fundamentals: for on the basis of religious authority and political authority the country was sorely divided.

Comparatively, then, and not absolutely, the adjective 'unwritten' when applied to constitutions, in the chief example thereof, means (1) that all is not included in writing which might be, while some things are altogether excluded which in other constitutions are included; and (2) it is not the result of deliberate establishment and adoption as a whole, with the result that no external sign marks off a constitutional from an ordinary law. Let us again insist that the differences are not absolute, but relative; that they are a matter of 'more or less' when compared with written constitutions. Further, the differences are more important to the lawyer than the political scientist.

Dicey, for example, in *The Law of the Constitution*, seriously exaggerates the differences, because he will not look behind the law at the social forces which sustain both Continental written constitutions and British constitutional conventions. He ascribes far too great artificiality to written constitutions, and omits consideration of the very important conventions which cluster about them, and make them workable.

*The Rise of Written Constitutions.* Written constitutions have developed from two causes. Where an old social power-relationship has collapsed, usually in violence, a definite and coherent assertion of a new power-relationship was embodied in written form. Secondly, where political and administrative waste and friction can be avoided, and where hitherto unattainable purposes are brought nearer realization, the conditions of united action among a number of States as in the U.S.A., the Swiss Federal Union and the Commonwealth of Australia are laid down in a constitution. This is well shown by the history of written constitutions.

The first attempt at a written constitution was made in England in 1649<sup>1</sup>: the Agreement of the People, a document drawn up and approved by the Council of officers of the Parliamentary Army. Its purpose, as stated in its preamble, shows why written constitutions are desired: 'to take the best care we can for the future, to avoid both the danger of returning into a slavish condition and the chargeable remedy of another war.' 'We are fully agreed and resolved [there is the stuff of written constitutions !], God willing, to provide, that hereafter our Representatives be neither left to an uncertainty for times nor be unequally constituted, nor made useless to the ends for which they are intended. In order where unto we declare and agree. . . .' The Agreement never became effective.

<sup>1</sup> Originally drawn up in October, 1647. Cf. Gardiner, *Constitutional Documents of the Puritan Revolution*, p. 270 ff.



In 1653 the Protectorate was organized by the Instrument of Government made by Cromwell and his officers. The *Instrument* defined the powers of Protector and Parliament.<sup>1</sup> 'It was high time', said Cromwell's friends, 'that some power should pass a decree upon the wavering humours of the people, and say to this nation, as the Almighty Himself said once to the unruly sea: "Here shall be thy bounds: hitherto shalt thou come and no farther."' Indeed, one element in fundamentality of the constitution is stability; 'wavering humours' and constitution are contradictory notions; and the figure of the 'unruly sea' being 'bound' by earth recalls the terms 'fundamental' in general use, and 'ground law' used in Germany. The Restoration put an end to written constitutions in England. The Parliament elected in accordance with the *Instrument* denied its validity, arguing that only Parliament had the authority to make such an instrument,<sup>2</sup> and it was upon this occasion that Cromwell uttered a classic dictum on constitutions.<sup>3</sup>

The country which was to be the most conspicuous example of an 'unwritten' system was, however, the mother of written constitutions. For the religious and political struggle which had caused the Puritan Revolt, caused many of the same anti-episcopal, anti-royalist citizens to forsake their native country and found colonies in North America; and it was in these colonies that the written constitution had an infancy, not cut short as in England, but robust enough to determine the later political life of their surroundings and to be a very potent example to Europe. For two conditions existed in the New England colonies which did not exist in the old country: the people who founded them were Puritans, and therefore they were predisposed in favour of democratic government; secondly, since they had broken away from the old foundations, and were in an entirely virgin country, a basis of co-operation had consciously to be formed.<sup>4</sup>

<sup>1</sup> Gardiner, p. 314 ff.

<sup>2</sup> Firth, *Cromwell*, p. 341.

<sup>3</sup> 'In every government there must be somewhat fundamental, somewhat like a *Magna Charta*, that should be standing and be unalterable.' (Speech to the First Protectorate Parliament, 12 September 1654; cf. *Letters and Speeches of Oliver Cromwell*, with elucidations by Carlyle (Lomas, London, 1904, II, 382.)) The Instrument was a dictator's constitution and it derived its significance from the strength of his army; and like all Constitutions given by dictators its virtue depended upon the dictator's necessities, for no authority other than his own, neither Parliament nor Court of Justice, was acknowledged as greater. (Cf. Carl Schmitt, *Die Diktatur*, 1928, for a discussion of dictatorship.) This constitution was replaced by another concocted by some of Cromwell's supporters early in 1657, called the *Humble Petition and Advice*, (cf. Gardiner, 334 ff.), debated and accepted by the House of Commons. The preamble contrasts turbulence, restlessness and unquietness with peace, tranquillity, and a 'settlement upon just and reasonable foundations'. It had sought to settle the Protectorate beyond the life-time of Cromwell by making the office hereditary, but Cromwell refused the Kingship.

<sup>4</sup> In 1639 Connecticut adopted *The Fundamental Orders* and in 1641 Rhode Island adopted a decree defining its fundamental institutions. The Preamble to the *Fundamental Orders* clearly indicates the ultimate purposes of a fundamental law: the

The immediate progenitors of modern written constitutions were, however, the constitutions made by the American colonies when they threw off the authority of Great Britain. The Congress of Philadelphia, organizing resistance, adopted, on the motion of the New England representative, John Adams, this resolution: 'That it be recommended to the respective assemblies and conventions of the United States, where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular and America in general.'<sup>1</sup> This resolution was adopted in May, 1776. Already two colonies, New Hampshire and South Carolina, had adopted such constitution. In June, Virginia followed suit, and her constitutional activities are most famous because they set up the first Declaration of Rights, a model not only for America, but for Europe also.<sup>2</sup> By

key words are 'peace and union', 'orderly and decent'. For the other colonies Royal Charters supplied constitutions. Poore, *The Federal and State Constitutions of the United States*, I, 249; S. G. Fisher, *The Evolution of the Constitution of the United States*, Philadelphia, 1904, Chap. II, p. 41 ff.

<sup>1</sup> Borgeaud, op. cit., p. 17.

<sup>2</sup> *The Virginian Declaration of Rights*, 12 June 1776. A Declaration of Rights, Made by the Representatives of the good People of Virginia, assembled in full and free Convention, which rights do pertain to them and their posterity as the basis and foundation of government. (I) That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. (II) That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all time amenable to them. (III) That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when a government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal. (IV) That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator or judge to be hereditary. (V) That the legislative, executive and judicial powers should be separate and distinct; and that the members thereof may be restrained from oppression by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies supplied by frequent, certain and regular elections, in which all, or any part of the former members to be again eligible or ineligible, as the laws shall direct. (VI) That all elections ought to be free, and that all men having sufficient evidence of permanent common interest with and attachment to the community, have the right of suffrage, and cannot be taxed, or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not in like manner assented, for the public good. (VII) That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. (VIII) That in all capital or criminal prosecutions a man hath a right to demand the cause and

the spring of 1777 all states but Massachusetts had promulgated new constitutions or appropriately amended the old. Massachusetts completed the series, in 1780, and its constitution vies closely in importance with that of Virginia for the completeness with which it expresses the political theory of the day.<sup>1</sup>

Here were deliberate acts to secure a firm basis for political life. The beliefs of the day as to what institutions were fundamental were written down, and endowed with solemnity by their adoption by special conventions and the grave declarations of intention and faith put at the head of the documents. The constitution of Massachusetts begins with an epitome of John Locke's *Civil Government* and a thanksgiving to God—'the great Legislator of the Universe'—for the opportunity to form a constitution peacefully and honestly. Soon there were thirteen written constitutions, deliberately concocted and recorded arrangements by which men declared their lives bound for the future. The extent to which they were bound by these fundamentals is to be discovered only in the documents themselves, but an analysis of this we defer to a later part in this discussion which concerns the substance of constitutions.

The centre of interest then shifted to France. That country had been ruled until the Revolution by a system which was arbitrariness itself. The elements which disputed for political authority, the Crown, the *Parlements* (half-judicial, half-legislative assemblies), the nobility, nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgement of his peers. (IX) That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (X) That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. (XI) That in controversies respecting property, and in suits between man and man, the ancient trial by jury of twelve men is preferable to any other, and ought to be held sacred. (XII) That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments. (XIII) That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free State; that standing armies in time of peace should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. (XIV) That the people have a right to uniform government; and therefore that no government separate from or independent of the government of Virginia ought to be erected or established within the limits thereof. (XV) That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles. (XVI) That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the duty of all to practise Christian forbearance, love and charity towards each other.

<sup>1</sup> Massachusetts Constitution, 2 March 1780.

the municipalities, all the leaders of the Third Estate, all had need of something more bracing to their claims than the mere power to get themselves obeyed, and members of the bodies sought the sources of stable authority in so-called *fundamental laws*, laws which, for example, set bounds to the arbitrary authority of the Crown, or at least, laws which should establish a set order in which this authority should predictably operate. This hankering after a *loi fondamentale* is a most interesting phenomenon, and it is understandable that in the absence of a written constitution men should pretend, with little authentic evidence, that fundamental laws did exist, which when appealed to, would abolish confusion and terminate disturbing controversies. Discussions of this kind were older than Montesquieu, but his *De l'Esprit des Loix* stimulated discussion and contributed an historical analysis of French monarchy which led to the conclusion that the monarchy of France was limited, since authority must be certain and stable, and secondly, that monarchy required limitation by 'intermediary powers', the nobility, clergy and magistrates. Two quotations will make this clear. Monarchical government differs from despotic government thus: the former is 'that in which one person governs, but by fixed and *established* laws: while in a despotism there is a single ruler, without law or regulation, led only by his will and caprices'.<sup>1</sup> And again: 'The intermediate, subordinate and dependent powers constitute the nature of a monarchical government; I mean of that in which a single person governs by fundamental laws. . . . These fundamental laws necessarily suppose the intermediate channels through which power flows; for if there be only the momentary and capricious will of a single person to govern the State, nothing can be fixed.'<sup>2</sup> Montesquieu was only one, though perhaps the greatest, of many who sought to establish the proper fundamental laws of the French monarchy,<sup>3</sup> and the metaphor he used for the intermediary powers, namely, 'channel', indicates very well the binding, restricting quality of a fundamental law. And though there were numerous conclusions reached, these varying with the interests and social class of the theorists, all sought *guarantees*.<sup>4</sup>

Just when relief from arbitrary government became most urgent in France, after 1770, the American Revolution occurred, and the American Declaration of Independence and the State Constitutions put into legal form and phrases the aspirations felt by the French. John Adams and Benjamin Franklin showed their friends in France the new constitutions: and, in 1783, all the American constitutions

<sup>1</sup> Montesquieu, *Esprit des Loix*, Book II, Chap. I.

<sup>2</sup> Ibid., Bk. II, Chap. IV. Cf. also Chapter VI of this work, *supra*.

<sup>3</sup> Montesquieu's position is brilliantly discussed in Dedieu, *Montesquieu et la tradition politique anglaise en France* (Paris, 1909), and more recently by Carcassonne, *Montesquieu et le problème de la constitution française au XVIII<sup>e</sup> siècle* (Paris, 1927).

<sup>4</sup> Lemaire, *Les lois fondamentales de la monarchie française* (Paris, 1907).

were translated and published in France, and were eagerly discussed all over the country.<sup>1</sup> The German scholar Jellinek has shown that the French Declaration of Rights of 1789 had its direct model and stimulus in American events :<sup>2</sup> that Rousseau's Social Contract theory cannot have been the forerunner thereof, that mere natural rights theories were insufficient, without a precipitating cause, to bring about their legal formulation. The very terms coined by the American revolutionists became part of French revolutionary vocabulary : declaration of rights, national conventions, committees of public safety, and so forth. Thus, on 2 October 1789, the constituent assembly voted the *Declaration of the Rights of Man and Citizen*, and in its Preamble is to be found all the essential reasons for a written constitution :

'in order that this declaration, being constantly present to the minds of members of the body social, they may for ever be kept attentive to their rights and their duties : that the acts of the legislative and executive powers of government, being capable of being at every moment compared with the end of political institutions, may be more respected<sup>3</sup> and also that the future claims of the citizens, being directed by simple and incontestable principles, may always tend to the maintenance of the constitution, and the general happiness.'

This declaration was declared to be 'solemn' and the rights 'sacred', while the timely and obliging presence of the Supreme Being at its acceptance was acknowledged and his blessing and favour solicited. In 1791 followed the first full written constitution : and then, at intervals until 1875, others, until by that year twelve immutable constitutions had vanished into the limbo of past years.

In 1875 the thirteenth constitution organized the Third Republic.<sup>4</sup> Unlike the previous constitutions, it is not a compact and complete document headed by a Declaration of Rights, but three separate laws together covering the main constitutional problems of the day—the status and authority of the Executive, and the composition and relative authority of Chamber of Deputies, Senate, and the Executive. It is fragmentary—omitting a guarantee of rights, and any mention of the organization of the judiciary, the civil service, and local government. But the 'principles of 1789' are held by most constitutional lawyers to apply to the present constitution.<sup>5</sup>

<sup>1</sup> Cf. Borgeaud, op. cit., Chap. IV, also Fay, *The Revolutionary Spirit in France and America* (London, 1928), and Aulard, *Histoire politique*, 1789–1904.

<sup>2</sup> Jellinek, *Die Erklärung der Menschen- und Bürgerrechte*, 3rd Edition, 1919. On the whole, later research, even French research, agrees with the views expressed in this study.

<sup>3</sup> Cf. Grimm's saying that all the rules of government could be put in a few pages. This, of course, is simply a reflection of late eighteenth-century optimism in general, the Age of Reason.

<sup>4</sup> Cf. Duguit et Monnier, *Lois Constitutionnelles*.

<sup>5</sup> Cf. Duguit, *Traité de Droit Constitutionnel* (1924). Duguit considers that a law violating one of the principles formulated in the Declaration of Rights of 1789 would be unconstitutional, see Vol. III, Chap. VI, p. 564 : Hauriou, *Précis Élémen-*

France set the example of written constitutions in Europe, and the soldiers of the Revolution and the Empire carried the notion into Italy, Belgium, Spain and the South German States. Her experience is the most striking example of the written constitution arising out of revolution, that is, an abrupt change in the facts and the expression of the social power-relationship.

In 1787 in the American Colonies occurred the first considerable example of a peaceful federation of States made to abolish causes of inter-state friction and to secure the benefits of large-scale organization. This gave rise to the Constitution which founded the U.S.A., and which, with some amendments, still rules that mighty nation.

*The Political Effects of a Written Constitution.* The question we may now ask is, what is the political effect of the form of the constitution? Is the country with a written constitution capable, by that fact, of better government than the country with an unwritten constitution? Is there any substantial balance of advantage one way or the other?

If the effect of expression in writing alone is considered, the written constitution has little, if any, advantage over the unwritten. For, firstly, the written constitution is not more revered as more solemn and fundamental, than the unwritten constitution. In the countries of written constitutions people endeavour to stimulate reverence for them by urging their antiquity, the dramatic struggles which gave them birth, the character and ability of the men who promulgated them.<sup>1</sup> But all these things can be urged with even greater force of the British Constitution; and, if the essence of the constitution is its unalterable character, then written constitutions have the grave disadvantage of production by a deliberate and demonstrable, and, therefore, a disparegeable operation. All constitutions have a conservative effect, like all things, whether matter or concepts, which

*taire de Droit Constitutionnel* (1930), p. 81: There is no need to assume an implicit reference to the principles of 1789 which are 'without need of sanction in constitutional law'; Esmein, *Éléments de Droit Constitutionnel* (1921), I, 560, 561: The National Assembly did not reject the principles proclaimed in 1789, but considered it useless to proclaim them again or guarantee them in the Constitution.

<sup>1</sup> James M. Beck (sometime Solicitor-General of the United States), *The Constitution of the United States*, London, 1922, pp. 9-10: 'A few wise and noble spirits, true Faithfuls and Great Hearts, led a despondent people out of the Slough of Despond till their feet were again on firm ground and their faces turned towards the Delectable Mountains of peace, justice and liberty. . . . So enduring was their achievement that to-day the Constitution of the United States is the oldest comprehensive written form of government now existing in the world. Few, if any, forms of government have better withstood the mad spirit of innovation, or more effectively proved their merit by the "arduous greatness of things done".' All this seems to me to miss out the fact that the Constitution after the Civil War was something different from the Constitution before it, and that in the Supreme Court the United States of America possess a constitutional convention not democratically appointed but in permanent session. Again, p. 50: 'The Constitution is to-day not a ruined Parthenon, but rather as one of those Gothic masterpieces against which the storms of passionate strife have beaten in vain.'

exist, but those which are written are not noticeably more or less conservative, simply because of their expression in writing. Secondly, are written constitutions more decisive of controversy than the British Constitution? Is their meaning more certain and definite? Experience shows that they are not; or if they are, then only to a very small degree. For no constitution is so detailed that interpretation, or 'construction' as it is technically called, is unnecessary. Only the broad principles can possibly be laid down by a constituent assembly unless it is to sit permanently; and were it to do this its reputation would be no better than that of the ordinary law-making body. Even the most detailed written constitutions, those of some American States,<sup>1</sup> and the German Constitution of 1919, do not yield their meaning without much interpretation. This occurs in various forms, chief of which are legislation, and decisions of the courts of law when cases raise problems. The latter is discussed later in the analysis of the 'Supremacy of the Constitution', but we may at once say that the constitution of the U.S.A. is contained in the official edition in thirty-one pages; but the clauses when set down with the chief cases fought upon them need 700 pages, and then it must be remembered that in most cases there is a dissenting opinion; and finally, that students may even dissent from both the majority and the minority. What, then, does the constitution say? Statutes are made to give the clauses of the constitution precision and body. For example, the French Declarations of Rights contain explicit warnings that the articles shall have effect according to laws yet to be made: freedom of opinion, the security of private property, are instances of this. Then others like the 'career open to the talents', the position of the Churches, public education—these mean little or nothing without concrete elaboration. So, too, in the German constitution of 1919 article after article ends with the phrase—'a law shall state the details', or 'within the general laws'. Thus, the constitution cannot be accepted as the sole evidence of what is constitutional—it must be taken together with the laws which further define it. A written constitution, then, is the product of the constitution and of the laws and decisions issuing from it.

In Britain, however, constitutional principles are directly embodied, explicitly or as implied, in particular statutes. If it is desired to find the general principles of the British Constitution it is necessary to generalize from a vast body of particular legal decisions, resolutions, statutes and biographies; a written constitution, however, yields up its general principles upon direct reading. But *only* its general principles; and they are, as a rule, so general, that they are contradicted by the statutes defining them or the behaviour of

<sup>1</sup> Every article of the 170 in the German Constitution has already given rise to a voluminous literature, and which is every day increasing.

political institutions apparently acting in virtue of them. How, indeed, could agreement be reached on fundamentals were not those fundamentals so vague that all objections could be covered? Therefore, no written constitution, not the French, nor the German, nor the American, nor the Australian, nor any, can stand by itself. It needs completion: for the virtue of the law resides in its details. And the laws which give it completion are not appreciably different from the laws passed in a country with an unwritten constitution.

Further, even though the constitution is written in some detail, and though it is completed by statutes and judicial construction, complete certainty as to its meaning is not attained. There is as lively a controversy over every article, even sentence, of the constitution in France, Germany and U.S.A., as there is in Great Britain: perhaps more. The intentions of the founders, the social conditions of the country at the time of the establishment, the new cases which have arisen in a new era, all are explored with aggressive attention to every word and comma.

*There is little advantage in mere writing or proclamation.* Is there any at all? At the most the written constitution is a standard of reference; and it is valuable only in proportion to its clarity and the extent to which it has not been altered by interpretation. As no constitution satisfies these conditions for more than a decade after it has issued from the constituent assembly, the advantage approaches nil.

A distinction, in short, must be made between the quality of a constitution as derived from its being written, and the difficulty of amendment, and these two things must not be confused.<sup>1</sup> It is not the writing which safeguards, but the obstacles to amendment. The amending process is of more importance than the writing, and the writing is not of principal but of incidental importance.

(ii) **Amendment.** *Indeed, the essence of a constitution is its inflexibility* as compared with ordinary laws. We might define a constitution as its process of amendment. For to amend is to deconstitute and reconstitute. *That is the respect in which all other constitutions differ from the British Constitution.* Broadly speaking (and we shall have to make some modifications later), in the British governmental system any institution, whether considered to be fundamental or not, whether stated by past Parliaments or judicial decisions to be fundamental or not, is alterable, to the extent of abolition—formally—

<sup>1</sup> Such a confusion might arise from Laski's *Grammar of Politics*. He says (op. cit., pp. 304-6): 'There are notions so fundamental that it is necessary in every state to give them special protection. . . . It (the legislature) ought not, in a word, to be able to alter the basic framework of the state except under special conditions, direct access to which is rendered difficult. . . . This implies, I think, a written constitution.'



by the ordinary process of law-making : that is by a bare majority of the House of Commons and the ordinary collaboration of the House of Lords as laid down in the Parliament Act. An act to abolish important powers of the House of Lords, or to restrict the power of Trade Unions, may be passed by the same procedure as an act relating to widows' pensions or a minor field of public health or education. This is considered to be the extreme of flexibility. Other constitutions are rigid in various degrees.

The U.S.A. Constitution was purposely made most difficult to amend. The amending section, Article 7, prescribes four possible processes of amendment : (1) Two-thirds of both Houses may propose amendments, or (2) the legislatures of two-thirds of the several states shall call a convention for proposing amendments, and ratification shall take place by (3) three-fourths of the legislatures of the several states, or (4) by conventions of three-fourths of the several states. In practice, no amendment has taken place except by proposal by Congress and ratification by the legislatures of the States. Further, two-thirds of Congress means not two-thirds of the legal membership, but of a quorum,<sup>1</sup> according to Congress and decisions in the National Prohibition Cases.<sup>2</sup> Other questions of detail arise, such as whether there is any limit upon the time for ratification, for, theoretically, the States could take a century over this<sup>3</sup> ; or whether a State can withdraw once it has ratified<sup>4</sup> action which has several times been threatened. These things serve to show that even a written constitution can cause as much perturbation and doubt as an unwritten one, and there is one even more important point, *whether there are implied or intrinsic limits to the amending power* ! This we discuss later.<sup>5</sup>

The main point, however, is : what is the political effect, the effect upon the power-relationship in society, of this amending process ? It was intended to make change difficult ; it has made change almost unattainable. It was apparently intended to make change difficult because in the fundamental political institutions were included these things : the indestructibility of the States, the strength of the Federal authority, the central management of inter-state and foreign commerce (the immediate stimulus to the Union), the maintenance of the sanctity of contracts, care for the soundness of paper currency, and distrust of democracy. These, and other considerations, in different degrees, commended the Constitution to the ruling classes : the men of big business (merchants, manufacturers, land speculators, bond-

<sup>1</sup> *Constitution*, Art. I, Sect. 5, para. I : 'A majority of each (House) shall constitute a quorum.'

<sup>2</sup> *Ohio v. Cox* (1919), 257, Fed. 334, 348 ; 253 U.S., 350, 386 (1920).

<sup>3</sup> Burdick, *The Law of the American Constitution*, 1922, p. 43.

<sup>4</sup> *Ibid.*, pp. 43, 44.

<sup>5</sup> It is discussed in the final footnote of this Chapter.

holders), the lawyers, the clergy.<sup>1</sup> But it was admitted that though 'too mutable' a system was dangerous, the error of the previous Articles of Confederation, which made amendment wellnigh impossible, must not be imitated, since 'extreme difficulty might perpetuate its (the Constitution's) discovered faults'.<sup>2</sup>

The Constitution of the U.S.A. has suffered nineteen amendments since 1789. Some writers, to prove the rigidity of the Constitution, point out that between 1789 and 1890 some 1,900 amendatory resolutions were submitted to Congress, of which only nineteen obtained the necessary assent of both Houses, only fifteen being actually added to the Constitution.<sup>3</sup> But this is not entirely relevant to the problem of rigidity, for many resolutions were thrown out on account of their intrinsic valuelessness, and would have been rejected in a country where amendment is easier than in the U.S.A. The nineteen amendments which have so far (until 1929) been adopted fall into three main groups. The first includes the first ten amendments. They add to the Constitution that which had been omitted by the business-like Convention of 1787: a Bill of Rights.<sup>4</sup> This was included, before the Constitution lost its plasticity, by the efforts of Virginian democrats in 1791, and supported by most Anti-federalists who were alarmed by the strength of the new government.<sup>5</sup> This group includes also Amendments XI and XII, which add to the scope of the Federal Judiciary and reorganize the Presidential election.<sup>6</sup> The second group, the thirteenth, fourteenth, and fifteenth Amendments, were made between 1865 and 1870 and register the principal constitutional results of the Civil War.<sup>7</sup> Though mainly directed to securing the complete emancipation of the slaves, and the security of their citizenship on a basis of equality with all other citizens, these articles have been

<sup>1</sup> Cf. Beard, *An Economic Interpretation of the Constitution of the United States*, 1913, and *Economic Origins of Jeffersonian Democracy*, 1915; Schuyler, *The Constitution of the United States*, New York, 1923; Farrand, *The Framing of the Constitution*, 1913; Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution*, 1894.

<sup>2</sup> *The Federalist*, No. XLIII (by Madison): The theory that amendment was made intentionally difficult is founded upon the theory that the aristocratic and mercantile interests desired stability. Cf. Smith, *The Spirit of American Government*, 1919, Chap. III. In fact the records of the Federal Convention do not show the intention to make amendment difficult; rather the contrary. See *Documentary History of the Constitution, U.S.A.*, State Department, III, 64, 123, 403, 711 ff. Further evidence is to be found in the *Elliot Debates in the several State Conventions on the Adoption of the Federal Constitution*, 5 vols., Edn. 1901; II, 169, 201; III, 26, 304, 305, 629; IV, 130, 178.

<sup>3</sup> Cf. Ames, *Proposed Amendments to the Constitution of the United States*. Between 1890 and 1904 a further 435 amendments were proposed.

<sup>4</sup> Cf. *Documentary History*, 1894, II, 377.

<sup>5</sup> Cf. Elliot, *Debates*, II, 80, 401, 411, 532; III, 317, 318, 449, 657; IV, 163, 210, 243; and Ford, *Pamphlets on the Constitution of the United States* (1888).

<sup>6</sup> This Amendment was the direct result of the case of *Chisholm v. Georgia* (1792), 2 Dallas, 419, in which the State was sued. It so aroused the fears of the States for their sovereignty that the Amendment was pressed.

<sup>7</sup> Dunning, *Reconstruction, Political and Economic*, 1865-77, Chap. IV ff.

literally interpreted and have come to mean vastly more in the life of all Americans than was intended.<sup>1</sup> So much for the certainty of a constitution which is written! The terms which specifically apply to slavery had not been obtainable by the process of amendment, or by the voluntary action of the Slave States. The regular amending process was insufficient to regulate such a great spiritual and economic change. Negotiation followed negotiation, and war was the only exit.<sup>2</sup>

The other amendments concern diverse subjects. Article XVI makes possible a Federal income tax. This, according to the Constitution by Article I, sec. 9, para. 4, and sec. 2, para. 3, was impossible, and in 1895 a judicial decision<sup>3</sup> declared Congressional legislation<sup>4</sup> on the subject unconstitutional. Thenceforward until 1909, political agitation and Congressional activity were necessary until the proper majorities were obtained, and in 1913 the clause was ratified.<sup>5</sup> Article XVII amends the composition of the Senate and establishes state-wide election. This also was the result of long agitation.<sup>6</sup> Then came Article XVIII introducing national prohibition of alcoholic liquors, and, lastly, in 1920, universal suffrage, especially to include women suffrage.

**If one man could stay an Amendment!** We have already indicated the means adopted to secure Prohibition.<sup>7</sup> Enough political energy, in the special degree required by the Constitution, was stoked up in the Congressional electorate and in thirty-six States, to overcome the opposition of other electors and of representatives themselves. Extraordinary exertions, and abnormally powerful means of propaganda, were needed to overcome the obstacles to amendment: such excitation was practised that the mind of the voter was unbalanced (and regret followed in saner moods), and the idea that power of any kind is properly employable in such a task was made current. To all action there is a reaction, and their strength is reciprocally proportioned. The difficulties of amendment being especially great, their conquest requires an intensity of application, and therefore, other things being equal, of unscrupulousness, beyond that which is normal in political campaigns. In this order of ideas War, civil or international, is the extreme example. In the matter of women suffrage,

<sup>1</sup> Cf. e.g. Mott, *Due Process of Law* (1926).

<sup>2</sup> Schlesinger, *New Viewpoints in American History*, 1922, Chap. III; Van Deusen, *Economic Bases of Disunion in South Carolina*, 1928.

<sup>3</sup> *Pollock v. Farmers' Loan and Trust Co.*, 157, U.S. 429, and 158, U.S. 601.

<sup>4</sup> 28 Stat. 509.

<sup>5</sup> In the case of *Hylton v. United States* (1796), 3 Dallas, 171, it was decided that the only direct taxes within the meaning of the Constitution, are taxes on land, and capitation taxes. Only after 1894 did the Court begin to examine the validity of this dictum in a critical spirit. The new interpretation aroused hostility in quarters where expectations were based on the preceding practice.

<sup>6</sup> Haynes, *The Election of Senators*, 1906.

<sup>7</sup> Chap. IV, *The Conditions of State Activity, Analytical*.

too, there was an undignified and ugly struggle, although to the leaders of the women's party, the campaign was heroic, and the leaders heroines. The historian of that movement says : ' It is one way of describing their system to say that they worked on Congress by a series of electric shocks delivered to it downwards from the President, and by a constant succession of waves delivered upwards through the people. This pressure never ceased for a moment. It accumulated in power as the six years of this work went on.'<sup>1</sup> There were all the episodes of sensational misdemeanours for advertisement purposes, picketing, arrests, mass meetings, forcible feeding, the martyr's defiance of authority and suffering, and such a condition of excitement that strong men roared that they would burn jails ! Tremendous pressure was exerted on the States, and none so great as that on Tennessee, when it seemed likely to be the thirty-sixth State to ratify. The campaign was, in the words of the campaigners, a ' whirlwind '. The atmosphere of Nashville, the capital, ' grew rapidly more active . . . tense . . . hectic '. Suspicions of bribery, charges and fears that members were renegades ; and then victory—by a majority of 49 to 47 !

There are two great political disadvantages attending the U.S.A. amending process. The first is the difficulty of amendment itself. This means that even a serious need for change may be thwarted, and the Constitution loses touch with the life of the society it is supposed to serve. From this follow conscious evasion of its clauses, and the hazards of judicial interpretation ; when these do not adapt the Constitution to modern needs, and this often happens, there is social suffering and stress.

But there is another result, the importance of which ought to be recognized. It necessarily requires such political behaviour as to bring settled, composed and rational government under a severe strain every few years. If the amending process were less difficult it would not be necessary to convince people by methods which make opponents, and even supporters, of a change, ultimately feel betrayed and cheated. Obedience is not likely to be given whole-heartedly when there is such a feeling ; and the law loses its sanctity as a moral obligation, for this depends not only upon its being part of the constitution, but upon the sentiment of fairness in the process of its creation. Then, when the amendment is made, it is impossible to modify it as a result of valid second thoughts produced by experience, without the same quantity and quality of propaganda used to secure its acceptance.

This is true of all articles of the constitution, including the amend-

<sup>1</sup> Inez Haynes Irwin, *The Story of the Woman's Party*, New York, 1921, p. 31. Note that there was already women suffrage in nine states (1912). The National Women's Suffrage Association had been at work since the early 'eighties, and the Senate had debated a Suffrage Amendment in 1887 ; agitation had been active in the several states.

ments. It is particularly true of the eighteenth amendment in which any modification by interpretation is rather less possible than in other articles. The motives of those who have passed the eighteenth amendment into the constitution may seem to them laudable and distinctly clever, but must seem cruel and irresponsible to those who are the victims of the amendment.<sup>1</sup> Now, it is true that the mere process of amendment will not give rise to such intolerance or misrepresentation. Reforming zeal pure and simple causes that.

There is, however, a measure in all things : and the more important each vote the greater the strain on the passions. An amendment can be defeated if those against it control a bare majority in thirteen states. In the Prohibition, as in the Woman Suffrage Amendment, if the thirteen states with the smallest Senates had been selected, the control of 159 State Senators there could have blocked ratification. 'If the thirteen wettest states had been selected, the control of less than 250 state senators could have defeated ratification.'<sup>2</sup> Each vote becomes of critical importance, for and against amendment. The logic of this argument reaches its extreme exemplification if 100 per cent. of the voters, that is *all*, were required for amendment :<sup>3</sup> There is a theoretical point where, since the vote is of permanent and unalterable significance, elections would cease to be fought by rhetoric and where murder would be instituted as the only effective electoral procedure short of this. Too difficult an amending procedure necessarily requires, if not the killing of the body, then the killing of mind.

*France, Australia, Switzerland and Germany.* No other democratic constitution is as difficult to alter as that of the U.S.A. In France the method is fairly simple.<sup>4</sup> The Chambers propose an amendment by separate resolutions, and by an absolute majority of votes (that is, an ordinary unqualified majority). Negotiations between the political

<sup>1</sup> This was the reason for snatching the votes by fair means and foul to the number required : 'An amendment was needed to provide stability. It was sought to put beyond the reach of temporary changes and excitements and of manufactured propaganda a great principle upon which the permanent well-being of the nation depends. Through nearly seventy years State prohibition had been subject to vacillation. After the people by hard work had enacted a prohibitory law the nationally organized liquor power would keep up its efforts to discredit and repeal the law. . . . Ratification should have settled for all time all question as to prohibition being the established policy of the nation and should have brought to an end both the pernicious activity of the organized liquor interest in politics and the catering to those interests by political leaders. . . . The adoption of the Eighteenth Amendment was the expression of the National will in the most decisive, respected and authoritative manner known to our experience as a nation.'

<sup>2</sup> D. L. Colvin, *op. cit.*, p. 595.

<sup>3</sup> Article V contains one clause in which this is actually decreed : 'Provided . . . that no State without its consent, shall be deprived of its equal suffrage in the Senate.' If a time should come, and it is possible that it will come, when the rich and populous States like New Jersey, New York, Pennsylvania, feel that they cannot any longer yield equal authority in the Senate to smaller and poorer States, there is likely to be extra-constitutional violence to settle the question.

<sup>4</sup> Art. 8, *Law of 25 February 1875*.

leaders of both Houses settle the form and scope of the propositions. The initiative may be Parliamentary, or Presidential. The resolutions voted, the Chambers meet together in National Assembly. An absolute majority of the numbers, that is, in this case, the *legal* numbers composing the National Assembly, is required for acceptance.<sup>1</sup>

The constitution has undergone revision thrice: once in 1879,<sup>2</sup> again in 1884 and again in 1926. In 1884 there were four amendments, of which only two have first-class importance. The organization of the senate was deprived of constitutional character, a wise act.<sup>3</sup> The amending clause was itself amended: 'The republican form of government cannot be made the object of a proposition to amend.'<sup>4</sup> The members of families who have reigned in France are ineligible for the Presidency of the Republic.' In 1926 sinking fund arrangements which had hampered the government fiscal plans were amended.<sup>5</sup> On this occasion there was once more raised the question which agitates the schools: is the National Assembly limited to amendments proposed by the Chambers, or once convoked, has it a general constituent power? There is disagreement on this question in France. Duguit argues that the Assembly may proceed without limitation: 'Esmein that the Assembly is bound.'<sup>6</sup> The only practical precedent on the matter is the revision of 1884 in which the Assembly went beyond the scope of the amendatory proposals and decreed that 'members of families which have reigned in France are ineligible for the Presidency'.<sup>8</sup> In 1926 people were much afraid that the Executive power would be strengthened.

The method of amendment in Australia, Switzerland and Germany exhibits interesting variations on what we have so far observed. In each of these countries arrangements are made for reference of the amendment to the people for ratification or rejection. In the first two countries such referenda are obligatory, in Germany they are optional. In Switzerland and Germany, further, a proposal to amend may come directly from the initiative of the people.

In Australia the process is as follows: <sup>9</sup> the amendment must be passed by an absolute majority of each House of Parliament, and between two and six months afterwards must be referred to the electors in each state. In order to overcome any difficulty arising out of disagreement between the Houses as to the amendment (quite possible in France until the necessary coincidence of views is produced

<sup>1</sup> The meeting is at Versailles, some say in order that there may be no disturbance by the proximity of the volatile Parisians, others that only Versailles has a hall capable of accommodating over 900 people with dignity.

<sup>2</sup> Disestablished Versailles as the seat of the Executive and Parliament.

<sup>3</sup> Law, 14 August 1884, Art. 3.

<sup>4</sup> Ibid., Art. 4.

<sup>5</sup> *Constitutional Law* of 10 August 1926. See Delpech et Laferrière, *Constitutions Modernes* (1928), p. 13.

<sup>6</sup> Duguit, *Traité*, 1924, IV, 538 ff.

<sup>7</sup> Esmein, *Éléments*, 1921, II, 501-11.

<sup>8</sup> Law, 14 August 1884.

<sup>9</sup> *Constitution*, Chap. 8, Art. 128.

by informal bargaining) the House proposing it may re-pass it again after an interval of three months (in the same or the next session) with or without amendments offered by the dissenting House, and it is submissible to the people whatever the attitude of the other House. The ratifying vote is a majority of all the electors voting; and a *majority of states* must approve. This is a simpler process than that of the U.S.A., yet it preserves the quality of distinguishing the process of amending the constitution from that of amending the ordinary laws, provides for deliberate popular assent and State rights, and makes for stability without stultification. It gives a fundamental quality to fundamental laws, yet avoids, by its moderation, the demoralizing effect of over-much rigidity.<sup>1</sup>

The democratic element, which is also an element lending distinctiveness to the constitution, was in European constitutions first used by Switzerland where the referendum is indigenous, and here more importance is still accorded to it than elsewhere.<sup>2</sup> The first Helvetic Constitution (1797) made arrangements for ratification by the primary assemblies. In a few years tragic events wrecked the Republic. Thenceforward to 1830 there was a slow building up which included the popular constituent power. It was merely a matter of time for this to be more thoroughly organized and embodied in the amending process of the cantons and the Federation. To speak of the Federation only, political evolution since 1848 has resulted in this method of amendment.<sup>3</sup> (1) A distinction is made between total and partial revision. Either council, by the ordinary legislative procedure, may pass a resolution for total revision, and if either council does not agree to the question whether there ought to be amendment it is referred

<sup>1</sup> The intention to refer to the people on the action of either House has been materially affected by the decision of the Governor-General in 1914—that the power to refer must be used strictly according to the wishes of the Ministers, thus depriving the Upper House of its independent position (see Keith, *Responsible Government in the Dominions*, Oxford, 1928, II, 690). The Referenda held have yielded mainly negative results. Amendments concerned with the date of office of Senators (1904) and Compulsory Military Service for recruiting overseas Forces (1916, 1917) were (the latter on the second occasion) ratified. On the other hand, the proposal that the Commonwealth should take over State debts was rejected in 1910; the Constitution Alteration (Legislative Powers) Bill of 1910 was rejected in 1911. The Bill proposed to give additional powers to the Commonwealth Government in connexion with trade, control of corporations, labour and employment, prevention and settlement of industrial disputes, combinations and monopolies. A second Bill for the Nationalization of Monopolies was also rejected (1911). In 1913 the former Bill was re-submitted and again rejected, each proposal being submitted separately. In 1919 Victoria, Queensland and Western Australia rejected the proposed amendments (which had been modified) for the third time (*ibid.*, p. 691 ff.). A minority of the Royal Commission on the Constitution, appointed by the Bruce Government in 1927, favour an easier method of amendment, pp. 243–7.

<sup>2</sup> The history of the cantons and the Federation is sketched in detail in Borgeaud, *op. cit.*, Bk. III.

<sup>3</sup> *Constitution of Swiss Republic*, 1874 (as amended in 1891 to introduce the constitutional initiative, Chap. III, Arts. 118–23).

to the people ; or the question is referred, if 50,000 voters demand a total revision. If the vote is in the affirmative, then new elections of both Houses to prepare the revision take place. (2) Partial revision—i.e. amendment proper—is proposed by the two Houses acting under their ordinary procedure, or by petition of 50,000 voters. (3) The revised constitution, or amendments, must be referred to the people and accepted by the majority of voters, and by a majority of the cantons. The constitutional initiative may occur in the form of separate general-suggestions or completed bills : if the former, then the Federal Assembly, if it agrees with the sense, must draft an appropriate amendment and refer to the people. If the Assembly disagrees, it must first refer the question whether there shall be a revision to the people ; and if the answer is affirmative, the revision must be carried out by the Assembly. Should the petition be already fully drafted, the Federal Assembly may at once refer it to the people ; or, disagreeing with it, may submit an alternative or a motion to reject, along with the petition, to a referendum.<sup>1</sup>

What is the net effect of this method of amendment ? It gives the constitution a majesty greater than that possessed by the ordinary laws. But the difference, when compared with Swiss legislative methods, is not so great, as when this method is compared with that which prevails in other countries. For the Referendum and the Initiative are an important part of Swiss democracy frequently used for ordinary legislation : except that in the Federal constitutional matters the referendum is compulsory, but in ordinary legislation is optional, while the Initiative requires a support of 50,000 voters for constitutional matters and only 30,000 for ordinary legislation, that is to say, it is more difficult to interfere with what we considered the more fundamental law. Secondly, 50,000 voters is about 8 per cent.<sup>2</sup> of the total qualified electorate in Switzerland, and is not a large number to organize with modern methods of transport and communication. Thus there is combined with the extra majesty and the solemn consultation of the people, the organized possibility of easy change. Advantage has been taken of this, for since 1874, fourteen amendments have been offered by the popular Initiative of which five have been accepted.<sup>3</sup> In the same time, some thirty amendments have been proposed and submitted to the people by the Assembly ; and of these twenty-four have been accepted. The possibility of the Initiative has stimulated the enterprise of the Assembly, and the enterprise of the Assembly has reduced the need for the Initiative.<sup>4</sup> Nor has the fear of constitutional rashness been warranted by Swiss experience.

<sup>1</sup> The matter is discussed in some detail in Fleiner, *Schweizerisches Bundesstaatsrecht* (Tübingen, 1923), pp. 396–8.

<sup>2</sup> *Ibid.*, p. 298.

<sup>3</sup> *Ibid.*, p. 315.

<sup>4</sup> Cf. F. Bonjour, *Real Democracy in Operation* (1920), pp. 142, 143.



Though it has been possible to undo, as easily as to establish, an amendment there has been no reversal, and little modification. The process is deliberate, not difficult, and its value is partly created by a set of conditions peculiar to Switzerland: long experience of democratic institutions, comparative simplicity of its problems, and the smallness of the country which sets much easier problems in the psychology of propaganda than in larger countries.

The German constitution of 1919 was obliged to draw its amending process directly from foreign experience and reason, for the constitution of 1871 was based upon such a peculiar set of circumstances, that it could afford no guide. The constitution of 1871, being designed to secure the hegemony of Prussia and at the same time to offer safeguards to the large states of South Germany like Bavaria and Wurtemberg, and being, too, an arrangement of Princes and not of peoples, the effective amending power was in the Federal Council, the *Bundesrat*. More particularly the Constitution ordained that 'Alterations in the Constitution take place by way of legislation. They are considered as rejected if they have fourteen votes in the Federal Council against them. Those provisions of the Constitution of the Empire, by which certain rights are established for separate States of the Confederation in their relation to the community, can only be altered with the consent of the State entitled to those rights'.<sup>1</sup>

The constitution of 1919 has a strongly democratic character acquired by the manner of its foundation, and embodied in its substance. It also contains a comprehensive Bill of Rights. It was necessary to provide for movement and also for stability. There have consequently been mingled the ideas of *special* majorities in the representative assemblies, and the initiative of the people.

Let us first consider the problem as it presented itself to the framers of the constitution. The essential problem still lay, as before, in the position of the States forming the Federation. The first impulse of Preusz, in his original draft of the constitution, was to make amendment slightly more difficult than ordinary legislation. While this required but a majority of a quorum (one-half the legal membership of Parliament), the amending process required a two-thirds majority in a quorum of two-thirds of the legal membership of both Houses—Reichstag and State Council. Besides this, amendments were to be ratified by a popular vote.<sup>2</sup> After the representatives of the states had discussed this draft, the amending process was slightly altered by the omission of the compulsory referendum, and its use was limited to cases of disagreement between the Reichsrat and the Reichstag.<sup>3</sup> This was apparently due to the attitude of the states which desired

<sup>1</sup> *Constitution*, 14, General Stipulations, Sect. LXVIII.

<sup>2</sup> Art. 51, *Entwurf: Reichsanzeiger*, 20 January 1919.

<sup>3</sup> Arts. 23, Part 4, and 54.

a less unitary system than Preusz had prescribed in his project, for Preusz had intended to overcome resistance to a future extension of Federal power by providing that, in the ultimate resort, the decision should lie with the whole people.<sup>1</sup> Two things in fact weighed with Preusz: the one was the necessity of greater difficulty in amending the constitution in a democracy than in an autocratic state—'experience shows that every people is the more jealous and cautious in the matter of constitutional amendments, the higher it sets the protection of its freedom by the constitution'. The second was the federal relationship. The extra difficulty of amendment tended to thwart the grasping of more powers by the Federal Authority. Preusz patently regrets this.

'But on the other hand the National Assembly must not disregard the fact that those powers which are not now constitutionally transferred to the Reich will be more difficult of attainment later by the amending process. What, therefore, remains to the States in this constitution, is much more secure than hitherto. But it is also important for the Reich to keep in mind this difficulty of extending its powers when it now proceeds to lay down what powers it is to have.'<sup>2</sup>

Little more was said in the Assembly on the question, excepting that a few interesting remarks were made by Dr. von Delbrück on the importance of easy amendment, for without ease the amending process, he said, became a '*manœuvre de force*'.<sup>3</sup> But the Eighth Committee on the Constitution took away from the Reichsrat (the Federal Council) equality of power with the Reichstag (the Popular Assembly) in the matter of passing amendments. The power was reduced to one of initiation, or of objection to a Reichstag resolution. But the Reichstag might override either the initiative or the objection of the Reichsrat. In the finally accepted form (Art. 76) of the constitution, it was arranged, that if the Reichstag overrides the Reichsrat's objection, this body may press its objection within two weeks, and demand a referendum. This arrangement, giving the Reichsrat the power to impose a referendum, was introduced in the Assembly, whereas the Committee's draft had arranged to leave the President a discretion in the matter of the referendum.<sup>4</sup> Finally, the Assembly, at the last moment, and hurriedly, voted the inclusion of the initiative for constitutional amendments,<sup>5</sup> as apparently, a corollary of the referendum and the initiative in ordinary legislation: 'If a constitutional amend-

<sup>1</sup> I think this can be established (a) from Preusz's general attitude to the problem of German federation; (b) by his explanation of the article relating to the amalgamation of small states with each other in the speech of 28 February 1919, Heilfron, *Die Deutsche Nationalversammlung*, von 1919, II, 689, in which he says that the referendum in this matter is a clumsy instrument but at least is an *ultimum remedium*; and (c) by the passage quoted in the text.

<sup>2</sup> Heilfron, II, 698, 699.

<sup>3</sup> Ibid., II, 954, 955.

<sup>4</sup> Bericht und Protokoll des 8. Ausschusses, p. 308 ff.

<sup>5</sup> See Heilfron, XI.

ment is to be decreed by a referendum consequent upon the popular initiative, the assent of the majority of *qualified voters* is necessary'.<sup>1</sup> This makes amendment by the initiative more difficult than the popular decision in ordinary legislation, since in that case, no more than a simple majority of *actual voters* is required.<sup>2</sup> The number of voters needed to initiate legislation, constitutional or ordinary, is one-tenth of the total qualified.<sup>3</sup>

Thus, in fact, three things have been accomplished: additional difficulty and majesty has been lent to the constitution: a mobile element has been introduced in the form of the constitutional Initiative whereby one-tenth of the voters, that is, about 4 million voters, may legally put the Reichstag on its mettle, causing it, if it disagrees with the suggested amendment *volens volens*, to put it to the country, though with a statement of its own views thereon; and lastly, it offers the states a special safeguard against Federal encroachment.

This last element in the amending process is of special importance in a Federal constitution, and all Federal constitutions pay special regard to the fundamental nature of Federalism by such arrangements. We have already seen this in the case of Germany, and in the case of the U.S.A. Switzerland demands that there shall be a majority of cantons as well as of voters for constitutional amendments, and so does Australia.<sup>4</sup>

*The Amending Process and Great Britain.* The chief distinction, then, between constitutions, from the standpoint of form, is in the amending process. Who has the power to alter the constitution is master of the State, and the amending clause gives this power. Everywhere except in England this has been made exceptionally difficult; and difficulty is established to provide the advantages of conservation of a set order of social relationships, and to secure deliberateness, in the hope that from this will issue respect; and both respect and growth are sought for in popular ratification and initiative.

Is Great Britain the worse off for making no special rules concerning constitutional amendments? Now, any State in which care is not bestowed on the reform of fundamental institutions wastes its well-being, physical and spiritual. *Care is fundamental: not writing, nor a difficult amending process.* If care, a rational weighing of all factors, is possible and probable, without artificial compulsion, then this is plainly unnecessary. None of the fundamental institutions is, in fact, treated without due circumspection. The great constitutional changes of the past century have, indeed, come slowly

<sup>1</sup> Art. 76, Clause I, Part 4.

<sup>2</sup> Excepting in the case of Art. 75, when the referendum is used to overcome a resolution of the Reichstag; there too a majority of qualified voters is necessary.

<sup>3</sup> Art. 73, regulating the Referendum and the Initiative.

<sup>4</sup> *The Constitution of the Commonwealth*, Chap. VIII.

rather than rapidly, and what is more they have all been preceded by long years of consideration and party manœuvres, and even by collaboration between the parties. In recent years this constitutional conservatism has even taken the form of a tentative convention. The reform of the House of Lords in 1911 was preceded by two elections, and in 1923 a special appeal was made to the country on the question of Protection.<sup>1</sup> At other times legislation of great importance has been introduced at the end of a session in order that the country might have the opportunity to reflect before the vital debates occurred: examples of this are the Health of Towns Bill in 1847<sup>2</sup> and the Education Bill of 1917.<sup>3</sup> Further, other legislation, like the Local Government Act of 1929, is introduced only after all the interests have been consulted and have had the opportunity to urge amendments to the original project.<sup>4</sup> The recommendations of Royal Commissions usually precede the drafting of laws, and these recommendations are made only after exhaustive inquiries. All in all, by its practice the British Constitution has gone far towards providing for extra deliberation in matters of fundamental importance. Finally, in many cases, especially to do with the electoral system, foreign affairs, and imperial organization, the government of the day seeks the co-operation of the opposition.

<sup>1</sup> 'I have been urged to try and avoid that pledge (made to Bonar Law in the previous year) as much as possible, but I have little skill in finding ways round, and it was no temptation to me to try and go on and keep in office using means that I was convinced were useless for my purpose; and it seemed to me that my only course as an honest man was to place my views before the country and take my chance. . . .'—*Hansard* (1923), Vol. CLXVIII (39): Prime Minister's (Stanley Baldwin's) Announcement. The comment of the *Liberal Magazine* (D. 1923, XXXI, 711) upon this decision was confined to the publication of the Liberal Party Manifesto which began as follows: 'The Government, elected twelve months ago on a programme of five years' tranquility, has suddenly decided to plunge the country into the turmoil of a General Election, on the allegation—unproved and unprovable—that Tariffs are a cure for unemployment. . . .'

<sup>2</sup> Viscount Morpeth 'moving for the Second time for leave to bring in a Bill for the Improvement of Public Health, especially in our towns and cities' referred to the defeat of the Bill in the previous year: 'The circumstances of that Session, the space of time that could be devoted to the measure, the inherent difficulty of the subject, the attempt, perhaps, to compass too much by too summary methods—may have all borne their part in it. . . .'—*Hansard* (1848), Vol. XCVI, 385.

<sup>3</sup> 'It is because the Government feel that in this sphere of administrative action, so decisive and fundamental in its consequences, there should be no suspicion on the part of hon. members that we are anxious to force the pace or to preclude a full and dispassionate criticism of our proposals, that I am standing at this Box this afternoon. We are aware that under the pressure of Parliamentary business it may not be possible for us to proceed very far with this measure during the current Session, but we are nevertheless desirous of taking this opportunity, while the Summer Recess is still in the future, of presenting our Bill for the consideration of the House and of the country.'—*Hansard* (1917), Vol. XCVII, 795, President of the Board of Education (Rt. Hon. Herbert Fisher).

<sup>4</sup> See for example: (i) Provisional proposals (on *Poor Law Reform*) prepared for circulation to the London County Council, Associations of Local Authorities and others concerned, as a basis for consideration and discussion (issued December 1925); (ii) Circular 658, *Poor Law Reform*, To Board of Guardians, 2 January 1926; (iii) Ministry of Health, Tenth Annual Report, 1928-9, Cd. 3362. Similar procedure was followed with regard to the financial proposals.

It is almost impossible to damage either the 'liberties of the subject' on the one hand, or 'necessities of State' on the other, without so much advertisement that injustice and unwisdom are sure of detection. Yet the possibility remains that in abnormal times, when excitement has been roused to an uncontrollable intensity, unwise things will be done, or acts committed which sting by their injustice and leave a mood of smouldering resentment. Occasions may arise such as those which produced the Trades Disputes Act of 1927. The advantage of the British Constitution is that errors may be reversed by an ordinary majority. What is fundamental, in short, is left to the people to decide, and they are also left to decide whether this shall be amended. They are expected to control themselves instead of being controlled by the constitution. It is as easy to remedy mistakes as it is to make them. Is it worth while, then, to (a) set up a special amending process which implies (b) a distinction between fundamental and other laws which implies (c) a written constitution which involves (d) the possibility of some other authority to declare Parliament's resolutions invalid? This would have serious effects upon the whole tenor of English political behaviour and organization. My personal view is, that it is not worth while to go to these lengths in order to safeguard against remote and rare possibilities. It is good that the responsibility should rest heavily upon Parliament; that it should therefore rest heavily upon the political parties; and that it should therefore rest heavily upon the people themselves.

Such an issue was raised during the debates on the Parliament Bill in 1910. The House of Lords, it was said, was the only existing defence against the interference of a chance majority in the House of Commons with fundamental institutions. Since the powers of this House were reduced to mere suspension for two years in the case of ordinary laws and practically abolished for money bills, there was no safeguard at all against the rashness of the lower House. Two alternatives were suggested; either the reform of the composition and fortification of the powers of the House of Lords, or failing that, the institution of the Referendum.<sup>1</sup> It was said, that until that time the House of Lords had, indeed, acted as an assembly for referring bills of fundamental importance to the people; for were these bills mutilated or rejected by the House of Lords the result was their re-inclusion in the party programme and their further recommendation in election campaigns. This argument did not prevail, since it was clear that the only fundamental institutions which the House of Lords had until then safeguarded were those opposed by the Liberal Party as being

<sup>1</sup> Cf. Spender, *Life of Sir Henry Campbell Bannerman*, II, 351-5. Cf. Sir William Harcourt's protest, on 14 February 1894. (Cited in Gardiner, *Life of Sir Wm. Harcourt* (1923), II, 256.)

unjustly fundamental, and ripe for amendment, if not for abolition. The issue is still open.

(iii) **The Supremacy of the Constitution.** If one element in the fundamentality of the constitution is its paramountcy as a regulator of political behaviour, how is this paramountcy secured? It ceases to be fundamental unless its principles are impressed upon the legislative, the executive and the judiciary. How is this supremacy organized? States fall into two great classes, in one of which constitutionality is ultimately interpreted by the Courts of Law, while in the other, political institutions, of which the representative assembly is the most important, as the law-making and executive-controlling institution, themselves determine the constitutionality of their actions. In the first group occur, principally, the U.S.A., Australia, Canada, and Switzerland: in the second, Great Britain, France, and Germany, although the latter shows, since 1919, a tendency to enter the first group. For the sake of convenient exposition we will examine the U.S.A. and England as archetypes, and introduce any consideration of other countries but briefly. We wish to know (a) what is the nature of the difference, (b) how it arose, (c) its meaning in terms of political institutions, (d) the effect thereof upon the general character of political behaviour.

(a) The difference, broadly, between the two countries is this, that in the first no body has legal authority to declare an act of Parliament or of the Chambers invalid, or to overrule Parliament's clearly expressed opinion as to its meaning; <sup>1</sup> whereas in the U.S.A. any act passed by the Congress, upon challenge by an interested party, is compared with the terms of the constitution, and if found in conflict therewith is declared unconstitutional, and, as such, of no effect. In England and France there is in effect parliamentary sovereignty, in U.S.A. the constitution is supreme, and that supremacy is maintained by the power of judicial review. Parliament is not legally bound to respect anything, but Congress must respect the limits set by the constitution, the eighteen articles giving it power, and prescribing the rights of individuals and states. The ultimate guardian of these limits and rights is the judiciary, whose summit is the Supreme Court of the U.S.A. How did this difference arise, and what are its effects?

<sup>1</sup> When of course the meaning is not clear, the Courts of Law are compelled to fall back upon their own conceptions of public policy. Cf. *Harvard Law Review*, November 1928: Winfield, *Public Policy in the English Common Law*. Of course, further claims were made for the power of the Courts to overrule the law-making authority, but this mainly at a time when that authority was the Crown and its Councils. Cf. Holdsworth, *A History of English Law*, IV (first published 1924), 173: 'Under the leadership of Coke, the common lawyers were claiming that the common law administered in their courts was the supreme law, to which even the prerogative of the Crown was subject. . . .' Cf. *Bonham's Case* (1609), 8 Co. Rep. 107; *Day v. Savadge* (1623), Hobart, 87. See also Dickinson, *Administrative Justice and the Supremacy of Law in the United States*, 1927, Chap. IV.

(b) It is easier to explain the manner in which American development began to diverge from English, than to say why it did. It seems natural that where there is a written constitution its binding power must be proclaimed and guarded by some institution; and if there is to be a binding force at all in a constitution, it ought to bind Parliament as well as other institutions. Yet, in fact, this logic has not been adopted in France, where there is a written constitution, and though there are eager champions of it there are as vigorous opponents; nor were the Courts of Justice in Germany before the War permitted to review legislation, and even now whether they shall do so is unsettled. Nor does the Swiss Federation submit to judicial review, but only the cantons.<sup>1</sup> Why, then, the U.S.A.? In spite of the efforts of American historians and political scientists and constitutional lawyers, the matter is still a little obscure.

There are two main possibilities: that the Courts at a certain point of time simply took this power and expediency caused its confirmation, and (or) the Fathers of the constitution really intended that there should be judicial review. The first is demonstrably true. But the question of intention is still obscure; and the best that has so far been done to review the situation at the time of the framing of the constitution has yielded these results. (1) Both the English constitutional conflicts of the early seventeenth century and the American colonial case against England rested upon the notion of a Fundamental Law. (2) In England, the struggle resulted in the establishment of Parliamentary supremacy, but, in America, constitutions were actually created by the People in whom sovereignty inhered; Parliaments were the creatures of this sovereignty, and therefore subject to the Law which created them. (3) The Constitutional Convention of 1787 was called partly—very largely, in fact—in order to create a defence against the crude State parliaments which were pursuing a jealous separatism, and which threatened, moreover, private rights like the keeping of contracts.<sup>2</sup> (4) Some of the States had already tentatively commenced judicial review,<sup>3</sup> and the most notable figures of the Convention actually desired it.<sup>4</sup> (5) Virginia had even suggested that the Federal legislature should have power to review the constitutionality of state laws and to call forth the force of the Union against any State that failed to keep its obligations, and

<sup>1</sup> Fleiner considers this to be unfortunate. See F. Fleiner, *Schweizerisches Bundesstaatsrecht*, Tübingen, 1923, p. 442 ff. All Federal acts are compulsory on the High Court.

<sup>2</sup> See *Madison in Farrand*, 6 June: 'Interference with these (private rights and the steady dispensation of justice) were evils which had, perhaps more than anything else, produced this Convention. Was it to be supposed that republican liberty could long exist under the abuses of it practised in some of the States?'

<sup>3</sup> See Corwin, Note V, on alleged Precedents for Judicial Review, in *The Doctrine of Judicial Review*, p. 71 ff.

<sup>4</sup> Beard, *The Supreme Court and the Constitution*, New York, 1912, p. 17 ff.

that *acts of the Federal legislature should be subject to the review of a council of revision composed of the executive and a part of the judiciary.*<sup>1</sup>

(6) The belief that the *separation of powers* would secure the liberty of the subject, by preventing either legislative or executive encroachment, was one of the most compelling ideas in American political philosophy, and it was given point by the fear of contemporary legislatures and the reputation of the Court, which, trained in the Common Law, were assumed to be dependable guardians of private rights. The judicial power was therefore a definite and separate power : and this definiteness and separateness were expressed in the words of a Massachusetts representative as a maxim than which ' none was better established : That the power of making ought to be kept distinct from that of expounding the laws '. This view was shared by leading and most eloquent members of the Convention.<sup>2</sup> Yet in France and Switzerland the same doctrine, the separation of powers, has been and is used, as an argument not for, but *against*, judicial review.<sup>3</sup>

There is no article in the constitution expressly declaring that it shall be interpreted by the courts, and by them alone. The only articles relative to judicial review are those on the constitution of the judiciary, and it is argued, that the general principles of judicial review were so much a matter of course, owing to the various factors indicated above, that the articles *must be assumed* to embody them. ' When, therefore, the convention adopted Article III of the constitution vesting the judicial power of the United States in one supreme Court and such inferior courts as congress shall from time to time establish,' it must be regarded as having expressed the intention of excluding congress from the business of law-interpreting altogether.<sup>4</sup> Further, Section II of the same article provides that, ' The judicial power shall extend to all cases, in law and equity, arising under this constitution. . . . ' Therefore it must extend to the law-making powers of Congress. And, finally, Article VI, Section I of the constitution runs :

' This constitution, and the laws of the United States that shall be made in pursuance thereof : and all treaties made or which shall be made, under the authority of the United States, *shall be the supreme law of the land* ; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'

*The Constitution is made supreme law.* Even in the States, and even if State constitutions are contrary, the constitution shall prevail, its guardians being the judges ! This latter section was the alternative proposed by the New Jersey Plan, the project of the smaller states

<sup>1</sup> Farrand, I.

<sup>2</sup> Corwin, op. cit.

<sup>3</sup> Cf. Hauriou, *Principes de droit Constitutionnel*, Edn. 1929, p. 279. Hauriou, however, is in favour of judicial review. Duguit, III, 673 ff., is strongly of the opinion that the separation of powers theory requires judicial review.

<sup>4</sup> Corwin, p. 42.



in the convention, to the Virginia plan which would have subjected the states to the Federal Congress, and it follows the New Jersey Plan almost word for word. *The constitution, then, is by this article, the supreme law of the land, and by Article III the Judicial power shall be vested in one supreme Court, etc., etc.* It is argued that this conclusion was intentional. But all that we have to-day is a proof of the contemporary need for judicial review, and some proof of its desirability. Unfortunately, no express resolution was taken on this matter in the convention: nor was there a definite discussion upon it. We are in the realm of conjecture: and all that can be said is that *probably* the convention desired it.<sup>1</sup>

In commending the constitution to the States for ratification, Hamilton, in No. 78 of *The Federalist*, is definite and emphatic about the power of judicial review.<sup>2</sup> Nothing could be clearer or more uncompromising than his statement. Its trenchant terms do seem to take for granted the law of the matter as implied in the constitution: and Hamilton was a delegate to the convention which made it. These terms reveal in the most graphic fashion the enormous gulf between the American and the British constitution.

Is it not an ironical commentary upon the supposed definiteness of written constitutions, that the most characteristic feature in which the American is different from most other written constitutions, its principal distinction, is placed so uncertainly in the constitution, and has to find its rightful position by an appeal to what may have been in the minds of those who framed it?

*Marbury v. Madison* and *McCulloch v. Maryland*. The law was hammered into its place in two famous cases decided in the Supreme Court under the Chief Justiceship of John Marshall, a strong supporter of the Federation against the States, a vigorous upholder of judicial review. The first was *Marbury v. Madison* (1803), and the second *McCulloch v. Maryland* (1816).

The opinion delivered in the first deserves extensive quotation, because it is not merely an essential part of the development of this peculiarity of the American constitution, but also a commentary upon written constitutions. The case was an issue between Marbury,<sup>3</sup> who

<sup>1</sup> Cf. C. Beard, op. cit., p. 55. In the series of pamphlets on the Constitution collected by Ford there is hardly a mention of judicial review, and where it is mentioned there is no sign at all that the authors had in mind what it has come to be.

<sup>2</sup> *The Federalist*, 78, pp. 484, 485: 'The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred, or, in other words, the Constitution ought to be preferred to the Statute, the intention of the people to the intention of their agents.'

<sup>3</sup> *Marbury v. Madison*, Secretary of State of the United States, Supreme Court, 1803, 1 Cranch, 137.

claimed title to a commission of justice of the peace, and James Madison who should have delivered the commission to him. Marbury asked the Court for a *mandamus* commanding the delivery of the Commission. Marshall gave judgement, refusing the writ on the ground that the Supreme Court had appellate jurisdiction only, and that this action was original. The action had been brought under the Judiciary Act of 1791 passed by Congress empowering the Court to issue writs of *mandamus* to any courts or officers of the U.S.A. This clause Congress had not the right to make, *for the constitution limited the Supreme Court to appellate jurisdiction*. Thereupon, Chief Justice Marshall asserted the supremacy of the Constitution and the power of judicial review.<sup>1</sup>

These are the weightiest passages (I italicize significant phrases) :

'The question, whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States : but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, *supposed to have been long and well established*, to decide it. That the people have an original right to establish, for their future government, such principles, as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. *The exercise of this original right is a very great exertion ; nor can it, nor ought it to be frequently repeated*. The principles therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.'

'This original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it ; or, that the legislature may alter the constitution by an ordinary law.'

'Between these alternatives there is no middle ground. *The constitution is either a superior, paramount law, unchangeable by ordinary means*, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislative shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law ; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.'

'Certainly all those who have framed written constitutions contemplate them as forming the fundamental paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.'

'This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the future consideration of this subject. . . .

'So if a law be in opposition to the constitution, if both the law and the

<sup>1</sup> In view of recent attacks on judicial power Marshall 'welcomed the opportunity of fixing the precedent in a case in which his action would necessitate a decision in favour of his political opponents'.—Warren, *The Supreme Court in United States History* (1928), I, 243. 'It must be noted that to contemporary opinion the importance of the decision lay in its alleged invasion of the Executive prerogative (i.e. that the Court might issue mandamus to a Cabinet official who was acting by direction of the President)', op. cit., p. 232. Cf. also Beveridge, *Life of John Marshall*, Vol. III, Chaps. 2 and 3.

constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution: or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.<sup>1</sup> This is the very essence of judicial duty.' The other view, '... reduces to nothing what we have deemed the greatest improvement in political institutions—a written constitution—and would of itself be sufficient, in America where written constitutions have been viewed with so much reverence (is this a sarcastic reference to French written constitutions, which already numbered four and which had not restrained the legislature?), for rejecting the construction. But the peculiar expressions of the constitutions of the United States furnish additional arguments in favour of its rejection.'

These principles were re-inforced and applied to the supremacy of the Federation over the States in *McCulloch v. Maryland*. But the principal importance of this case is its statement and application of the doctrine of interpretation known as 'implied powers'. The issue was this: <sup>2</sup> Congress had passed an act in 1816 incorporating the Bank of the United States. A branch was established in Maryland. Maryland imposed a tax upon notes issued by any bank or branch thereof established without its authority. McCulloch, the cashier of the Maryland branch, appealed against the judgement of the Maryland Courts. The Supreme Court, speaking through Chief Justice Marshall, ruled that Congress had the right to incorporate such a bank, and therefore the States must not thwart the use of this power by taxation. There was, indeed, no specific power given in the constitution to the U.S.A. to establish such a bank. But this was merely because everything could not possibly be expressly included in the constitution. Nothing excluded from the constitution '*incidental or implied powers*'.

'Thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to *depend upon a fair construction of the whole instrument*. . . . A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution is not only to be inferred from the nature of the instrument, but from the language. . . . It is, also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is *a constitution* we are expounding.'

Very well: of what general power is the power to establish a bank a fair corollary? Of the power of the sword, the purse, external relations, and the government of industry.

<sup>1</sup> Are not these Hamilton's words? (cf. note 2, p. 210).

<sup>2</sup> *McCulloch v. Maryland, et al.*, Supreme Court of the United States, 1819, 4 Wheaton, 316.

'It may with great reason be contended that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. . . . It is then, the subject of fair inquiry how far such means may be employed.'

Indeed, to the enumeration of Congress's powers, is added that of making

*'all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or any department thereof'.*

Of the degree of necessity, said Marshall, Congress is properly the judge, not the Courts.

'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional', and, ' . . . to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground'. Finally, 'that the power to tax involves the power to destroy: that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied'; and therefore, 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared'.

Over a century has elapsed since these judgements were rendered. The doctrines were often disputed, but judicial interpretation survived them, and the power of the Courts to review the constitutional validity of laws is the most striking feature of the American political system. From 1789 to 1924, 30,000 cases came before the Supreme Court, judgement upon which decided the validity of the laws and the meaning of constitution. In those cases fifty-three laws were declared unconstitutional.<sup>1</sup>

Schools of judgement have been synthesized in the brains of political and constitutional theorists: there are 'strict constructionists' and

<sup>1</sup> No estimate of the importance of judicial review can be based only upon these or any figures. Its importance can only be judged by importance of the cases reviewed and reviewable. We show later that some of these are of supreme political significance. The doctrine of implied powers is well illustrated in the following cases: *Sere v. Pitot* (1810), 8 Cranch 332; *American Insurance Co. v. Canter* (1828), 1 Peters, 511; *Marshall v. Gordon* (1917), 243, U.S. 521; *Newberry v. United States* (1921), 256, U.S. 232; *The Legal Tender Cases* (1871), 12 Wallace, 457, 555, 556; *United States v. Kagama* (1886), 118, U.S. 375.

'liberal constructionists', those who lean towards 'states rights' and those who subserve 'national centralization'. The doctrine of 'implied powers' has given special scope to the discretion of the Courts. 'To make all laws which shall be necessary and proper . . .' has been called the 'elastic clause', and where there is no warrant at all in the constitution a doctrine of the 'inherent powers' of government has been enumerated.<sup>1</sup> What, then, is the import of this political arrangement?

*Government by Judges.* The constitution is superior to the judgment of the authorities it creates, and the Courts interpret the constitution; in other words, the Courts are superior to the judgement of all other institutions, including Congress. Now, there is no set rule of construction which will unify the judgement of the 9 men who at any one time constitute the Supreme Court, or the many inferior judges throughout the country. The logic of construction is created by the judges; it does not govern their mind. For logic is procedure and no more, but the decision of a judge depends upon the nature of the premises from which he proceeds. If by nature, or the conviction of learning and experience, the judge is individualist, as Herbert Spencer might have been, or favours small states as William James might have done, or like millions of socialists believes that the community has large rights of control over the individual, these convictions enslave juristic logic and unavoidably emerge in the judgement. Thus, two things are of importance in the power of the Courts: their rules of construction, and the nature of their membership.

There is no indisputably authoritative system of interpretation: nothing which is universally accepted. That which exists is a synthetic production of commentators and Law Schools. It is a collection of sayings and reasons extracted from judgements rendered. But the judges contradict each other. They contradict themselves—not always on different occasions. Their real motives do not always square with their expressed reasons. Obviously the rules are general and vague: and just as obviously their number complicates the issue and trammels the conscience. A fresh case is liable to call for a fresh rule, or such an application of an old one that it becomes unrecognizable without the services of intricate casuistry, as consideration of some of these rules show.<sup>2</sup>

<sup>1</sup> Cf. *Missouri v. Holland* (1920), Holmes, J.

<sup>2</sup> *The Constitution (Annotated)*, 1924, Senate Doc. No. 154, 68th Congress, First Session. (1) The ends intended by the framers of the Constitution are to govern the validity of a law. (2) The obvious ends must not be defeated. (3) Where the words are ambiguous the sense which is most consonant to the object in view must be adopted. (4) A case cannot be excluded when the letter of the Constitution admits, but where it can be shown it was not in the minds of the framers. There must be *practical* not *technical* construction. (5) That which is implied, i.e. *fairly* implied, is as much a part of the Constitution as that which is expressed unambiguously (see cases cited in footnote, p. 213 *supra*). (6) The Common Law of England, some

It will be seen how many opportunities occur for the personal prejudices of the judges to have effect as part of the constitution of the U.S.A. Indeed little else could be expected where a constitution of twenty-five Articles and 8,000 words was made to fit one society, and is expected to serve the entirely different one of to-day.<sup>1</sup>

The transient problems of less than four million people at the end of the eighteenth century seemed permanent and necessary, and the thirteen sparsely populated agricultural communities could not but be altogether blind to coming things. How shall it serve a nation of forty-eight states, spreading over a diversified continent, with over a principles of which were incorporated in the Constitution, should be scrutinized for aid in finding the meaning, but it must be remembered that some of these limitations are in America applied to legislatures, while in England only the courts and the executive were affected. (7) The meaning of many of the provisions of the Constitution is 'best ascertained by bearing in mind what the law was at the time the Constitution and the amendments were adapted and ratified, not as reaching out for new guarantees, but as receiving such as the law then recognized'. (8) 'The Constitution is not to be interpreted with the strictness of a code of laws or of a private contract. The provisions for the protection of life, liberty and prosperity are to be largely and liberally construed in favour of the citizens. (Indeed! which group of citizens when several are in conflict?) In *Fairbairn v. U.S.* (181, U.S. 283) it was said: 'The fine spirit of Constitutional interpretation in both directions (grant of power and restriction of power) is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.' (9) Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts' (Holmes, J., in *Brown v. Walter*, 161, U.S. 591). Therefore do not interfere and overturn without exceedingly cogent reasons. (10) Even the rule of pursuing the general objects cannot however be followed in all cases. 'It will, indeed, probably be found when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enforces, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise, of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses,' etc., etc. (*Prigg v. Pennsylvania*, 16 Pex. 610). The Constitution must be adapted to meet new conditions. This, it is true, causes a queer use of language, as in *South Carolina v. U.S.*, 199, U.S. 448: 'In other words, while the powers granted do not change, they apply from generation to generation, to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning.' (12) The historical origin may be considered as aids in construction, but debate in the Constitutional Convention or in Congress is no evidence (*Downes v. Bridwell*, 182, U.S. 254). Legislation contemporary with the establishment of the Constitution is evidence of intention, but only in cases of doubt. (13) *The Federalist* and other such contemporary commentaries are entitled to great weight. (14) Every word must count in its common connotation unless there are special reasons to the contrary. 'Although the spirit of an instrument is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words; it cannot be inferred from extrinsic circumstances that a case for which the words expressly provide shall be exempted from its operation. The argument of inconvenience cannot prevail over plain words, but a construction which would necessarily occasion public or private mischief must yield to a construction which will occasion neither' (p. 45). Cf. also Story, *Commentaries on the Constitution of the United States*, 2 vols. (1891), Vol. I, Bk. III, Chap. V; Cooley, *A Treatise on the Constitutional Limitations*, 7th Edition (1903); see also B. N. Cardozo, *The Nature of the Judicial Process*; and Willoughby, *The Constitution of the United States* (1929), I.

<sup>1</sup> Frankfurter and Landis, *The Business of the Supreme Court: a Study in the Federal Judicial System*, 1927.

hundred million inhabitants, and these not of a primitive agricultural but of an ultra-modern industrial and agricultural civilization ?

Now the law-making activity of parliaments in Western Europe in the nineteenth century, has been directed to two main ends, to regulate commerce and manufactures, and to mitigate the evils arising from the reign of *laissez-faire* in social and industrial relationships. In all other countries but the U.S.A., the scope and substance of that activity has been determined in general by the unconfined discretion of representative assemblies. In the U.S.A. alone has it been defined and often seriously limited by the Courts. For the Federal Congress has been obliged to respect constitutional clauses which were made before large-scale enterprise or capitalistic industry had shown its characteristic signs, and those clauses are peculiarly rigid, since the amending process is so difficult. The whole tone of the constitution is *laissez-faire* and local government : it safeguards liberty and property and State rights, whereas the developments of the nineteenth century have been towards collectivism and centralization. All the chief clauses of the constitution have had to be interpreted under the pressure of these problems. But the two which have caused most anxiety, most difficulty and most controversy are the Commerce Clause<sup>1</sup> and the Due Process Clause. The Commerce Clause empowers Congress 'To regulate commerce with foreign nations, and among the Federal States. . . .' It is clear that in so far as inter-state commerce is concerned, the elastic terms are 'commerce' and 'among the several States'. What is commerce ? Does it include telegraph messages which move, substanceless, in wires ; correspondence sent by correspondence colleges : passengers on railways ; women in White Slave Traffic ; manufactures not yet moved, but intended to be moved, into other states ? At what point do commodities of commerce acquire the character inter-state, and when do they cease to fit into this classification ? Where is the margin between regulations which effect only inter-state conditions and those which, in fact and with intent, govern the domestic industrial conditions within each state ?<sup>2</sup>

It is, at any rate, by the interpretation of this clause that the Federal authority, and with it the Congress, have moved from strength to strength.

The Due Process Clauses are two : the first concerns the Federal authority, and says :<sup>3</sup> 'No person shall be . . . deprived of life,

<sup>1</sup> Art. I, Sect. 8, Clause 3.

<sup>2</sup> Cf. Thompson, *Federal Centralization*, 1923 ; C. K. Burdick, *The Law of the American Constitution*, 1922 ; Willoughby, *op. cit.*, Vol. II, Chaps. XLIII-XLVIII ; Henderson, *The Federal Trade Commission*, 1924 ; Judson, *The Law of Interstate Commerce and its Federal Regulation*, Chicago, 1916 ; Freund, *Standards of American Legislation*, Chicago, 1917, pp. 27, 278 ff.

<sup>3</sup> Amendment V.

liberty, or property, without due process of law . . .'; the second,<sup>1</sup> intended specifically to safeguard the liberty of the emancipated slaves, says: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .' Now, if due process of law meant, as it generally means in Great Britain, or on the Continent, that parliamentary rules of procedure have been properly followed, that the executive has given consent in the proper form, and the act has been published in accordance with the conventional or constitutional forms, the interpretation of the power of Congress or the state parliaments would rest with these assemblies alone. But 'due process'! what is the meaning of 'due'? It must be due, in accordance with the constitution, for that is the supreme law of the land. Then the Courts are the interpreters of what is due: and so the circle is once more complete—the Court must ask what does the clause 'imply', what is a 'fair' interpretation of the clause. And the term upon which the Courts fall back is 'reasonable'. If the law is 'reasonable', the process of its creation is 'due', and it is constitutional: if it is 'unreasonable' it is not a 'due' process, and the law is unconstitutional. And who shall say what is 'unreasonable'? It is obvious that a 'well-defined yardstick', as Chief Justice Taft has called it, is not available for such judgements; at least, not a yardstick with the qualities one expects such a thing to have: never longer nor shorter than itself, and always the same length to everybody. The power of the Supreme Court is here greater than in other issues, for it is the final judge, not only of Congressional laws affecting 'due process', but also of the laws of the States. This is indeed an imperial power!

Let us glance at some of the issues which have been raised before the Supreme Court in the 'due process' clause, especially as revelatory of ways of judgement. In *Lochner v. New York*,<sup>2</sup> the validity of a ten-hours law for bakers, made by the State of New York, was disputed by *Lochner*, a baker. Previous courts had upheld the act by majorities of three to two, and four to three, as a proper exercise of the state's police power, which is a legitimate encroachment upon private liberty and property. The majority of the Supreme Court denied that the statute was a 'legitimate' exercise of the police power. The Court had been and was guided by rules of a very liberal nature, but there was a limit, and the question to ask was, 'Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labour which may seem to him appropriate or necessary for the support of himself and his family?' This is not fair and reasonable. It is not enough simply to assert

<sup>1</sup> Amendment XIV (adopted 1868). Cf. Mott, *Due Process of Law* (1926).

<sup>2</sup> *Lochner v. New York* (1905), 198, U.S. 45.



that the bakers' health or the public health are sought by the law. A much more direct relation must be shown between the law and the purpose than was in fact shown. 'The trade of baker . . . is not an unhealthy one *to that degree*. . . .' All occupations are unhealthy. 'But are we all, on that account, at the mercy of legislative majorities?' This is a 'mere meddlesome interference' with 'grown and intelligent men'. It is 'unreasonable and entirely arbitrary', for it is impossible to discover 'the connexion between the number of hours and the healthy quality of the bread. . . .' The real motives of the law are others than those on the surface of the Bill.

Justice Holmes, dissenting, thought that 'reasonableness' should be interpreted as what *he* believed a

'reasonable man might think a proper measure on the score of health'. 'The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A Constitution is not intended to embody a particular economic theory, whether of fraternalism and the organic relation of the citizen to the state or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgement upon the question whether statutes embodying them conflict with the constitution of the United States.

General propositions do not decide concrete cases. The decisions will depend on a judgement or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us toward the end. Every opinion tends to become law.'

What a difference between the conceptions of the 'reasonable'! Some years afterwards (*Bunting v. Oregon*)<sup>1</sup> it was admitted (by 5-4 decision) that a limitation of hours was *valid*.<sup>2</sup>

In *Hammer v. Dagenhart*, the Supreme Court invalidated a Congressional Law of 1916 prohibiting interstate commerce in the products of any mines and quarries in the United States, in which children under 16 were permitted to work, and in the goods made in industrial establishments where children under 14 were employed at all, or those between 14-16, for so many hours a week. The essence of the judgement against the law was that this law interfered with the police power of the states. They alone had the right to regulate their domestic industrial conditions.<sup>3</sup>

'In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people, the powers not expressly delegated to the National Government are reserved. (*Lane County v. Oregon*, 7 Wall. 71, 76). The powers of the States to regulate their purely internal affairs by such laws as seem wise

<sup>1</sup> *Bunting v. State of Oregon* (1917), 243, U.S. 426.

<sup>2</sup> 'The right of the legislature under the Fifth and Fourteenth Amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established.' Chief Justice Taft dissenting in *Adkins v. Children's Hospital*, 261, U.S. 525.

<sup>3</sup> *Hammer, United States Attorney for the Western District of North Carolina v. Dagenhart, et al.* (1918), 247, U.S. 251.

to the local authority is inherent and has never been surrendered to the general government. (New York v. Miln, 11 Pet. 102, 139, Slaughter House Cases, 16 Wall. 36, 63, Kidd v. Pearson, *supra*.) To sustain this statute would not be in our judgement a recognition of the lawful exertion of Congressional Authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce upon the States.

‘In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labour of children in factories and mines within the states, a purely state authority. Thus the act in a twofold sense is repugnant to the constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.’<sup>1</sup>

Holmes, dissenting, with three of his colleagues, agreed that direct intermeddling was not permissible, but congress could use its constitutional powers *whatever the indirect effect*.

‘But if an act is within the powers specially conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.’<sup>2</sup>

He then showed how in many cases, Congress had been sustained in its use of powers strictly on a par with these—the levy of a tax to prohibit the coloration of margarine, the Sherman Act to deal with trusts, the White Slave Act, and others. Why, then, should this be excluded?

‘But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgement upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation—if it ever may be necessary—to say that it is permissible, as against strong drink, but not as against the product of ruined lives.

‘The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbours. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different

<sup>1</sup> Ibid., Justice Day.

<sup>2</sup> Ibid., Justice Holmes dissenting.

view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said, with quite as much force as in this, that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.'

One other case : *Adkins v. The Children's Hospital*.<sup>1</sup> In this the issue was the validity of a law fixing a *minimum wage* for certain classes of women's work. The Court, by a decision of 5-3 (Justice Brandeis not participating), invalidated the law. The ostensible grounds of the majority's judgement were the (1) vagueness of the relationship between the wages paid and the morals of the workers (an object of the law being to safeguard morals), (2) the exaction from the employer of an arbitrary payment for a purpose and upon a basis having no causal connexion with his business, or the contract or the work the employee engages to do ; (3) ' If, in the face of the guarantees of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. A law to fix a maximum might one day follow.' ' A wrong decision does not end with itself ; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity to the other.' (4) To sustain liberty of contract in this instance ' is not to strike down the common good (to which the liberty of the individual must frequently yield) but to exalt it ; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.'

The dissenting answers to this view were that the court had already admitted limitations upon freedom of contract in regard to the wage-relationship,<sup>2</sup> and more importantly upon hours of labour. What difference could fairly be made between the fixation of wages and that of hours ? Chief Justice Taft could see none. Justice Holmes' grounds were more general. The question was the reasonableness of Congress's action. And the Court's answer need be no more than this : ' When so many intelligent persons (Congress, many States, and governments from which we have learnt our greatest lessons), who

<sup>1</sup> *Adkins et al.*, constituting the Minimum Wage Board of the District of Columbia *v. Children's Hospital* of the District of Columbia (1923), 261, U.S. 525.

<sup>2</sup> ' Moreover, there are decisions by this Court which have sustained legislative limitations in respect to the wage term in contracts of employment. In *McLean v. Arkansas*, 211, U.S. 539, it was held within legislative power to make it unlawful to estimate the graduated pay of miners by weight after screening the coal. In *Knoxville Iron Co. v. Harbison*, 183, U.S. 13, it was held that store orders issued for wages must be redeemable in cash. In *Patterson v. Bark Eudora*, 190, U.S. 169, a law forbidding the payment of wages in advance was held valid. A like case is *Strathearn S.S. Co. v. Dillon*, 252, U.S. 348.'

have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief may be held by reasonable men.'

The difference between the majority and the minority (or at least Justice Holmes) was this: the majority's view of reasonableness was founded upon a calculation of the social advantages and disadvantages of the law, and proceeded from an analysis of its merits in their opinion, while the minority's was governed by sufficient evidence to show that men who could be deemed reasonable had thought such legislation reasonable. Or, as Holmes put it: 'The criterion of constitutionality is not whether we believe the law to be for the public good . . . I should have my doubts, as I have them about the statute—but they would be whether the bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the game was worth: *A matter that it is not for me to decide*'.

Whereas, in other countries, the theory of State activity has been elaborated by economists and political theorists, and the results embodied in legislation by the representative assembly, in the U.S.A., the Courts and chiefly the Supreme Court has taken the effectively major hand in deciding what shall appear on the Statute Book,<sup>1</sup> and has been itself a ready source of economic and political theory which has found its outlet in the delivered opinions.<sup>2</sup>

*The Political Consequences of Judicial Review.* We are now in a position to realize the full distance between the American and British Constitution and between the former and European written Constitutions. In America, there is a tribunal superior to Congress. In Great Britain there is none superior to Parliament. It may be and often is said, that it is not the Supreme Court which is superior to the Congress, but the constitution. This, however, is only a verbal quibble, for the constitution does not speak: within the oracle are men, who construct the constitution. Nor do they know what the constitution originally meant: nor even were all its makers agreed upon what it meant.<sup>3</sup> It was, indeed, a favourite idea of the Fathers, excellently well expressed in the Massachusetts Constitution, that 'this shall be a government of laws and not of men'. Vain delusion! For whatever speaks through the mouth of man, speaks through his

<sup>1</sup> E. Freund, *Standards of American Institution*, 1917, Chap. VII.

<sup>2</sup> J. R. Commons, in the *Legal Foundations of Capitalism* (New York, 1924), shows the creative rôle of the Supreme Court in the field of economic and political theory. The Supreme Court was an important contributor to the class of 'Volitional' theories (initiated by Hume, Malthus, Carey, Cassel, Anderson). Of these thinkers, Commons writes: 'Instead of a commodity or a feeling, their unit of observation becomes a transaction between two or more persons looking towards the future. Theirs becomes a theory of the human will in action, and of value and economy as a relation, partly of man to nature, but mainly of man to man; partly of quantities and partly of expectancies depending on future quantities.'

<sup>3</sup> Cf. the diversity of opinion as to the nature of the Federal relationship; see Chapters on Federalism and on the Presidency.

mind, and of all that moulds it ; and this, in a developing civilization, steadily supplants the original law.

What, then, is the fundamental difference between the American and the British Constitution ? It is this. Whereas the British Parliament, democratically elected, is the ultimate authority upon the appropriate principles of the constitution at any given time, the American Congress is only the court of first instance in this decision, and is overrutable by a Supreme Court of nine members, not democratically elected. In Britain fundamental issues are decided almost by direct democracy ; in America they are decided by a body of lawyers neither appointable nor dismissible by democracy. The only remedy against these ultimate law-givers is a constitutional amendment by a process difficult and dangerous. Comparatively, not completely and absolutely, Great Britain is governed by politicians, and America by lawyers, but by lawyers whose function is that of the politician in the highest degree. The issues to be decided by the judges are not technical issues, nor such as can be subsumed under a perfectly clear major proposition accepted by all ; but in the end, they are moral issues, and to answer them requires that men shall always be asking the question, consciously or unconsciously, ' What judgement will make for the best civilization, granted my ultimate convictions about God, the Devil, Humanity, Progress and the rest ? ' These judges are statesmen, and the lawyers, politicians and teachers have put their recognition of this into terse terms : they talk of Government by Judges, Judicial Oligarchy, the Aristocracy of the Robe, Covert Legislation, Judge-made Law.<sup>1</sup> We ought to say that the executive authority, which is separately empowered by the constitution, is also subject to the same judicial control, but we have preferred to emphasize the legislative aspect.

Since what shall be the law depends upon a majority of five judges out of nine, it is clear that the appointment of each judge is of great moment. It is not surprising therefore to find that on the occasion of a vacancy the organs of opinion, Press, party managers, Congress, President, ' political circles ' just on the fringe of the official politics, the Congressional lobbies, the hotels of Washington, the seminars and common rooms of Universities, the club cars of crack railway trains, excitedly discuss the prospect. There is almost as much ado about a Supreme Court appointment in the U.S.A. as there is in the choice of a new party leader—a possible Prime Minister—in Parliamentary countries, with perhaps just a little less overt noise.<sup>2</sup> The struggle for appointments has been specially urgent of recent years—for social legislation has been a source of keen dispute.<sup>3</sup> In the matter of one

<sup>1</sup> Lambert, *Le Gouvernement des Juges*, Paris, 1921, pp. 16, 58, 60, 220.

<sup>2</sup> Cf. Warren, *op. cit.*, *passim*, for the struggles regarding appointments at various times.

<sup>3</sup> The Senate debates of February, 1930, on the appointment of Chief Justice Hughes illustrate the nature of the struggle. The following are examples of the

appointment, at least, a first-class political scandal was provoked.<sup>1</sup> For the appointments are made by the President by and with the consent of the Senate, and the President is under obligation to the party leaders in the Senate. The party 'bosses' themselves, like most, but not all, politicians, find their first commandment in keeping the party vigorous, and this is done by obtaining all available offices and places of honour for adherents and in not offending the interests which constitute the party. But two other considerations govern appointment: geography and professional fitness. The first is of considerable importance in a Federation so extensive in area.

Nor is it surprising to find that in order to overcome the obduracy of judges who persist in deciding as they believe they ought, the plans have been broached of depriving them of their office by 'the Recall',<sup>2</sup> of establishing a qualified majority for the declaration of constitutional invalidity,<sup>3</sup> and giving congress power to override the court's decision.<sup>4</sup>

numerous arguments employed in opposing the appointment (which was ratified by 52 to 26 votes on 14 February): Mr. Hughes was 'a champion of property rights versus human rights'; he would be 'an addition to those who favoured aggregations of wealth and monopolies'. There was hostility towards a man who 'left the bench for the political arena' and again desired to return to judicial office. It was said that Mr. Hughes had once promised 'that the Supreme Court should never be dragged into politics'. Moreover it was urged that it was impossible to defend Mr. Hughes 'without defending combinations and trusts'; in view of his past record and career he was 'not fit to sit in judgement between organized wealth and those who toil'. Cf. *United States Daily*, February, 1930.

<sup>1</sup> Cf. *Senate Report on the Nomination of Louis D. Brandeis, to be an Associate Justice of the Supreme Court of the United States*, 64th Congress, 1st Session, No. 409, 1916.

<sup>2</sup> The arguments in favour of the Recall of judges are broadly: That in certain States judges are under corrupt corporate influence; secondly, that the Recall would give greater opportunity for the expression of the popular will and for the growth of 'democratic' ideas. Opposition to the Recall is based primarily on the need for an independent judiciary: 'In a proper sense, judges are servants of the people; that is, they are doing work which must be done for the government, and in the interest of all the people, but it is not work in the doing of which they are to follow the will of the majority, except as that is embodied in statutes lawfully enacted according to constitutional limitations. They are not popular representatives. On the contrary, to fulfil their office properly, they must be independent . . .' (Taft, *Message to Congress Vetoing the Arizona Bill*, cited in Taft, *Popular Government*, 1913, pp. 169, 170).

<sup>3</sup> The proposition that seven Justices out of nine shall concur in pronouncing an Act of Congress unconstitutional was formulated by Senator Borah (Senate, 5 February 1923). Previous and similar attempts were made in 1823, 1826 and 1868. Advocacy of this measure was founded on the belief that five to four decisions were a great evil and involved injustice. Arguments against the scheme are: That it would really involve control by the minority; that the judgement of the Court would in fact be a decision rendered at the behest of Congress; thirdly, if the proposal had been in force since the year 1789 it would not have changed the decision in more than thirteen cases, out of a total of fifty-three cases, in which Acts of Congress were held invalid. Moreover, Warren is of the opinion that the statute embodying the proposal would be unconstitutional. See Warren, *Congress, The Constitution and the Supreme Court*, Boston, 1925, Chap. VI.

<sup>4</sup> It has also been suggested that Congress shall prevail over a judicial decision in the following manner: If a statute is held unconstitutional by the Supreme Court but is enacted a second time by Congress (at least by a two-thirds majority) it shall therefore be held constitutional. This plan would make Congress supreme and dispense with the necessity of submitting any Amendment to the Constitution to the State Legislatures. *Ibid.*, Chap. V.

Three problems are raised by the comparison of the U.S.A. practice with British and Continental practice. The American practice of judicial review of constitutionality undoubtedly transfers from Parliament the fullness of sovereignty. What is taken from Parliament is ultimately taken from the people, and whether this makes in the long run for good or bad government, depends upon what value one attaches to democratic government. I may be permitted here to leave the general question open. But so much, I think, is certain : that a great deal of substance and dramatic effect, as distinct from transient and superficial sensationalism, are extracted from American politics by judicial review, for no politician can make a promise of major importance with the ring of truth in his declaration. Short of promising the almost unattainable—a constitutional amendment—he has very little to offer. Nor, though he roar like a bull, has he much to deny. It is significant that non-party organizations obtained the last two amendments. When vital questions are taken from the hands of the party organizations these are themselves devitalized. But in England and on the Continent the plenitude of powers is in the hands of the legislature, the parties and the people. Obtain a majority in Parliament and you may, legally, change the political and social fabric of the State. That is a spur to parties and a spur to the people to attack or to defend ; and both receive an education in political thinking and self-control. In America Congress is in a perpetual state of nonage, and the people likewise are bound by a testament made by their Fathers. In America responsibility for political behaviour may be thrown on to the Courts and the Constitution. There is no such escape from responsibility in Britain and Europe.

Secondly, in the same line of criticism lies the fact that in America political questions are discussed by Congress, the parties and the electorate not directly on their merits, not as to their social advantages and disadvantages, but as to their constitutionality. This stultification of political discussion does not occur elsewhere.<sup>1</sup> The prior interest is in the merits of the proposition, and it not infrequently

<sup>1</sup> But something like it occurs. People often retreat from the immediate matters of argument to the broader basis that the 'State' or the 'Constitution' is either benefited or jeopardized. Cf. Bentham, *Book of Fallacies*. . . . However, in America the form of the Constitution, the difficulty of its amendment and the casuistical traditions of 150 years give a prior and principal importance to this method of argument.

Beck, *op. cit.*, p. 134, comments upon the function of the Supreme Court thus : 'It must be added, however, that in one respect this function of the judiciary has had an unfortunate effect in lessening rather than developing in the people the sense of constitutional morality. In your country the power of Parliament is omnipotent, and yet in its legislation it voluntarily observes these great fundamental decencies of liberty which in the American Constitution are protected by formal guarantees. This can only be true because, either your representatives in Parliament have a deep sense of constitutional morality, or the constituencies which select them have so much sense of constitutional justice that their representatives dare not disregard these fundamental decencies of liberty.'

happens that whatever shows a balance of advantage becomes constitutional, if it is not so already. The discussions of constitutionality are, in America, always an interference with the direct consideration of political issues, and not seldom they establish a screen round the real questions. We might, indeed, add another phrase to the catalogue of logical fallacies, the *argumentum ad constitutionem*. On such fallacies the American system places a premium.

Finally, like all authorities which have great power, the Courts, and especially the Supreme Court, are alternately abused and applauded. But Courts of Justice cannot afford the charge of error or bias. For the Courts of Justice are not only seized with constitutional cases, but with other cases, in which states, individuals and corporations are in conflict, where people sue one against the other, where the State sues citizens—where, in short, the whole mass of claims under admitted law is decided. The multitude does not minutely discriminate, and when it mistrusts for one thing it may mistrust for another, though the cases are poles asunder; especially, also, when political leaders are ungarded and intemperate in their legitimate business of acquiring votes.

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In general, Europe has not followed the American example. It was suggested in revolutionary France by Siéyès,<sup>1</sup> and included in the constitution of the Year VIII, and later on the constitution of 1852 as a 'conservative senate' for constitutional vigilance. The Consul and the Emperor simply applied it to their own uses.<sup>2</sup> But there is not a little advocacy for judicial review at the present time, and the argument in its favour, however it may begin, always ends thus :

'But these varied causes of resistance do not prevent the principle from existing and of slowly propagating itself, *especially when one takes into account more and more the necessity of controlling parliaments*, because their legislation, motivated by electoral purposes, has become a dangerous menace to liberties.'<sup>3</sup>

This will be found even better expressed by the politicians than the

<sup>1</sup> Cf. Duguit, *op. cit.*, III, 466.      <sup>2</sup> Cf. Trouillard, *Le Sénat Conservateur*, Paris, 1912.

<sup>3</sup> *In favour* : Cf. Hauriou, *Principes de droit constitutionnel* (1929), pp. 270 and 288 ff.; Duguit, III, 467 ff.; Esmein, *op. cit.*; Jéze and Berthélemy, *Revue du Droit public*, 1912, p. 139 ff.; Berthélemy (*Rev. pol. et parl.*, Dec. 1925) argues that control has already occurred in some cases.

*Against* : Larnaude (*Bulletin de la Société de législation comparée*, 1902, p. 175 ff.; also *Rev. pol. et parl.*, Feb. 1926; Carré de Malberg (*Revue pol. et parl.*, Sept. 1927) thinks the constitution of 1875 excludes the possibility; Jéze, *Principes Généraux du droit administratif* (3rd Edn.), Vol. I, 341 ff. Jéze is not a blind admirer of the French parliamentarian but he thinks that, politically, judicial control is too dangerous and inconvenient. His article in the *Revue du Droit public* of 1912 was applicable only to Roumania where actual law does not expressly forbid it. In France, however, as it actually is, laws of 1790 and 1791 prevent this in his opinion. Ducz (in *Mélanges Maurice Hauriou*, 1930, p. 245) is against it for the interesting reason that 'in spite of security of tenure the Government . . . holds the judges in its hands if they have not altogether given up promotion'.



jurist.<sup>1</sup> In Switzerland the constitution of 1874 gave to the Federal Courts the power to review the constitutionality not of federal laws, but of cantonal laws. The referendum acts, it is suggested, as a check upon the Courts—but this is not the same kind of check as judicial review.<sup>2</sup>

*Germany.* Germany is the European country where the subject is most likely to become practically important. Under the old constitution hardly anybody supported judicial review; nor were the Courts held to be competent. But it was always agreed that the laws acquired validity only if they were passed as formally ordained by the constitution and that State laws could not override, but must fit in with, Federal law—*Reichsrecht bricht Landesrecht*—and that orders could be invalidated by the Courts if they were *ultra vires*, i.e. went beyond the statute. Anything further under the Bismarckian constitution would have been incompatible with the spirit of the constitution, for the supreme political authority, the body, indeed, which judged of inter-State disputes, the disputes between the Federation and the States, was the *Bundesrat*, and this could not acknowledge an authority higher than itself.<sup>3</sup>

Now the constitution of 1919 has various features which are more favourable to judicial review. There is popular sovereignty, there are fundamental rights, there is a well-expressed distrust of Parliament. Is Parliament, then, to be the ultimate arbiter of constitutionality? There is no express clause in the constitution establishing judicial review. The disputants are therefore thrown back upon hints obtainable from the proceedings of the constitutional committee of the National Assembly, and general, social and political theory applied to German conditions. Meagre results alone are obtainable from the proceedings of the National Assembly and its Committee.<sup>4</sup> In the latter the subject was debated by several of the most capable members, among them Preusz, the framer of the constitution, but it was impossible to secure agreement. Preusz was then in favour of judicial review, saying that it existed unconditionally wherever it was not expressly excluded,

<sup>1</sup> Cf. Reports on projects by Roche and Benoist, *Journal Official, Documents*, 1903, p. 99. Cf. the conservative political party programmes.

<sup>2</sup> Fleiner, *op. cit.*, p. 410. Compare also p. 448. The most brilliant part of the organization of the Federal power—'This constitutional judicability fulfils a special duty in the life of the Swiss Republic. In a democracy the ultimate bulwark of the constitution and law is the judge. The feeling that the law is safe is based on confidence in him. If in the narrow sphere of cantonal affairs political passion is at the helm, then the lowest citizen in the State knows that the way to Lausanne is open to him.'

<sup>3</sup> Cf. *infra*, Chap. X.

<sup>4</sup> The following members of the drafting committee of the constitutional convention at Weimar were in favour of judicial review: Hugo Preuss (Democrat); Düringer (German National); Cohn and Katzenstein (both Socialists), while Kahl (German Popular Party), Ablasz (Democrat) and Sinzheimer (Socialist) were against. Cf. *Bericht und Protokoll*, 483 ff.; and especially Morstein-Marx (*Variationen über Richterliches Zuständigkeit*), who is in favour of judicial review.

and pointed out that before the introduction of the constitution the subject had been discussed, some people asking him for express exclusion and some for express inclusion of the power of judicial review, but that his own view had been, and remained, that if nothing was said, then judicial review 'goes without saying'. Preusz's opinion in favour of judicial review can be described as intending to secure the *Rechtsstaat*, that is a government subject to the law as interpreted by the Courts of Justice. 'And now I wish to say this, that I cannot conceive of judicial activity in the full sense, if the Court is to be forced to apply a substantially unconstitutional law against its clear conviction.'

The constitution therefore says nothing at all about judicial review. Since its advent jurists have been much occupied with this problem, and the Courts have not been able to remain aloof. Broadly, opinion is divided among the jurists, and the division is based ultimately upon whether the lawyers trust or distrust the democratic process of government. Those who oppose unlimited democracy, and who mistrust Parliaments, argue that the liberties of the subject and the efficiency of government ought not to be left to the absolute mercy of politicians, party organization, and the modern electoral process. Nor, they say, is the bureaucracy what it once was, meticulously law-abiding and public-spirited, for the War and its aftermath shook its *morale*, and democracy has, or ultimately will, cause its corruption.<sup>1</sup> These arguments come almost unanimously from the conservative and liberal camps, and from socialists other than those who favour full parliamentary and direct democracy. The jurists, with rather more unanimity than in France, disbelieve in the possibility of justice emanating from Parliament, and with anti-autocratic impulses still passionately moving them, they demand at least as strongly as the liberal thinkers of 1848 the realization of the *Rechtsstaat*. The only guarantee lies in judicial review: nothing is to be hoped from 'power-hungry' parliaments,<sup>2</sup> parliamentary 'absolutism'.<sup>3</sup> It is plain, however, that *law* has nothing to do with the question. The constitution says nothing about it. The issues are *political* issues, and the real question of justification is begged by the lawyers. So much, once more, for the clarity of written constitutions!

The Courts themselves have not been able to avoid the issue, and have, indeed, assumed the power of judicial review, but without the confidence or militancy of John Marshall. In 1924 the united branches of the High Court (*Zivilsenaten*) left the question open, since there was great disagreement upon it; and this, though one

<sup>1</sup> This is put very clearly by Morstein-Marx, *op. cit.*

<sup>2</sup> Cf. Triepel in *Archiv des Öffentlichen Rechts*, Vol. 39, p. 537.

<sup>3</sup> Cf. Theisen in *Archiv des off. Rechts, New Series*, Vol. 8, p. 274.

branch,<sup>1</sup> had declared its permanent competence to review constitutionality. In the Revaluation Law Case (1925), the power was asserted, with only the foundation that, since the judge is independent and only 'subject to the law',<sup>2</sup> he has the right and duty to determine which legal provisions have the most commanding power: there is no attempt as with Marshall to found the utility of such a power upon the importance of maintaining the supremacy of the written constitution, because supremacy is a worthy thing.<sup>3</sup> It seems, however, that this declaration has, in the mind of most German lawyers at least, settled the matter affirmatively.<sup>4</sup> But opinion is opposed to the power of judgement being vested in the inferior courts: one supreme court for such cases is advocated to avoid uncertainty and waste of time and argument, both evident in the U.S.A.<sup>5</sup>

*Survey.* If we sum up the main differences in the forms of constitutions, we may say that they arise from the attempt practically to secure the *fundamentality* of the constitution, and this is sought

<sup>1</sup> R.G.Z. 102, 161 ff.

<sup>2</sup> So runs Article 102 of the Constitution.

<sup>3</sup> In the decision of the Reich Judicial Court (Reichsgericht) of 4 November 1925 (R.G.Z. 111, 320 ff.) the Court declared: 'The application of the provisions of the Revaluation Law presupposes that there are no valid considerations against the constitutionality of this statute which has been passed by a majority of the Reichstag. In view of the attacks made in public against the legal validity of the Revaluation Law it would seem imperative to undertake to review the constitutionality of this statute officially. In this respect the question arises at once whether and to what extent the courts are at all entitled and obliged to review the legal validity of a national statute which has been regularly proclaimed. Following the decision of the first criminal chamber of 15 December 1921 (R.G.T. 56, 177), we shall proceed from the fact that in the first instance any provisions of national law statutory as well as common, which directly or indirectly apply to the question, must rule. Furthermore, where such provisions are lacking, it will be necessary to go back to the general principles which may be derived from the nature of the legislative or judicial power and from the activities emanating from these powers, as well as from their inter-relationship. The Constitution has adopted, in article 102, the principle established in paragraph I (of the Law Regulating the Organization and Procedure of the Courts of 27 January 1877), that judges are independent and subject only to the law. This last provision does not preclude the power of the judge to deny the validity of a law or of part of its provisions to the extent to which they conflict with other rules of law which are of a higher authority. This is the case if a statute contradicts a legal rule set forth in the Constitution, and if in passing it the requirements provided for in article 76 for a constitutional amendment have not been met. The reason is that the provisions of the national constitution can be annulled only by a law, regularly proclaimed, changing the Constitution. Such provisions therefore remain obligatory for the judge even against differing provisions of a subsequent statute which has been passed and promulgated without observing the requirements of article 76 of the Constitution, and they compel the judge to let the contrary provisions of the subsequent statute remain without application. Since the Constitution itself contains no provision which takes away from the courts judgement of the constitutionality of laws or transfers it to another determinate authority, the right and the duty (*sic*) of the judge to examine the constitutionality of statutes must be recognized.'

<sup>4</sup> Thoma, in *Archiv des Öffentlichen Rechts*, Vol. 43, 272 ff., is a very good example of an opponent of judicial review on the ground that the Constitution already contains sufficient guarantees.

<sup>5</sup> Cf. Auschütz, *Die Verfassung des deutschen Reiches* (edn. 1930), p. 326; *Verhandlungen des 33. und 34. Juristentages*.

in three things : in writing, in the amending process, and in judicial review.

Mere writing does not secure the supremacy of the constitution, because the terms of the supreme instrument are not, and cannot be, sufficiently precise in detail and scope. Government is dynamic, and the most detailed of constitutions cannot meet all the cases which arise in an evolving society.

Supremacy is shown and maintained chiefly in the amending process, which everywhere, save in England, is made formally and really more difficult, while in England, itself, convention tends to make the process more difficult than ordinary legislation. Difficulty in amendment certainly produces circumspection and makes impossible the surreptitious abrogation of rights guaranteed in the constitution ; and where such rights, individual or State, are believed to be defeasible without a special safeguard, a difficult amending process has thwarted furtive encroachment. Yet, if this is pressed too far, the constitution ceases to be plastically responsive, and the rights of some are safeguarded at the expense of those who ask for the creation of new rights, while the strength of new social forces may compel a substantial evasion of the constitution and its amending clause, by popular refusals to obey, and governmental inability to enforce its terms. Further, even if slowly, the body which is the interpreter of the constitution, Parliament or the Courts, stretches and must stretch the meaning of the constitution, until it fits the advancing facts. Too difficult a process, in short, ruins the ultimate purpose of the amending clause, to maintain good government, causes the clandestine substitution of another fundamental law which is called by the old name ; and, unfortunately, causes the demoralization of the electorate by propaganda, which, to overcome the obstacles to amendment, must be particularly ruthless. But the amending clause is so fundamental to a constitution that I am tempted to call it the constitution itself.

Finally, in America, and partially <sup>1</sup> and tentatively in other countries, the fundamental quality of the constitution is secured by the establishment of the Judiciary as its interpreter. This device takes interpretation out of the hands of an elected body which is liable extravagantly to assert its own supremacy over the constitution, and puts it into the hands of a number of judges, whose training and tenure do not, indeed, transform them into impersonal oracles but, in fact, secure the triumph of the general spirit of the constitution

<sup>1</sup> In Australia and Canada, the High Court decides questions of constitutionality only in so far as the division of power between the Federal and State authorities is concerned ; for there is no limitation in the constitution of the plenitude of *some* government's powers. In Australia the ultimate appeal *may* be to the Judicial Committee of the Privy Council (cf. Smith, Judicial control of legislation in the British Empire, *Yale Law Journal*, Jan. 1925).

and the social theories of about two generations back. Where the constitutional issues are of grave import for the well-being of the State, the judges, doing the work elsewhere reserved to popularly elected statesmen, begin to be regarded as a unit in the struggle of partisans.

In other countries Parliament and the party system decide how far the constitution shall be supreme over them and how far they shall be supreme over the written and conventional principles of the constitution. This places a great responsibility upon parties and the electorate, and perhaps it is as well that these bodies should directly judge the gravest issues. The politicians are forced, at least, to think of improving their machinery and behaviour. Thus Barthelemy and Duez in France sum up :

'we think that the guarantees against parliamentary oppression should, in the existing state of our morals, be sought elsewhere than in the judicial review of constitutionality. We must organize Parliament so that we reduce the chances of the appearance of unconstitutional laws and develop the spirit of legality within it: since bicameralism, proportional representation, reform of procedure, the referendum, seem to us, in this respect, preferable to a too heavy arm put into the hands of an organ too weak to use it surely and securely.'<sup>1</sup>

In England, the parties and the electorate have so far been quite as able to provide the needful political institutions as countries which have withdrawn the constitution from the direct judgement of the people: indeed, have they not done better?

Lastly, judicial interpretation has been for the American constitution the most effective way of making the rigid constitution flexible enough to work. The rigid constitution has lived only by judicial respiration.

## II. SUBSTANCE

What have constitution-makers considered to be fundamental political institutions? It hardly needs to be insisted that the catalogue has changed with time. The power-relationship in that great amassment of human beings called the State, varies with every change in human resources and material inventiveness, and with every addition to the stock of ideas brought to mankind by the extraordinary of their race. These precipitate themselves into the constitution. But there is the acknowledged body of conventions, long-wrought and accepted by several generations, and there are the claims of the hour and the particular interests of the men who assemble to establish the tables of the law. These things mingle, and in the supreme instrument of government there may appear, side by side, the permanent and the transient. Yet all have the same theoretical validity. Let us glance at the development of fundamentals.

<sup>1</sup> Cf. *Traité de Droit Constitutionnel* (1926), p. 222; cf. also Duez, in *Mélanges Maurice Hauriou*, 213 ff.

1. The constant factor, since the Agreement of the People of 1649, has been the question of political authority.<sup>1</sup> Who shall be supreme? Shall there be direct or representative government, and whichever is chosen, how shall it be organized? In representative government, for how many years ought the assembly to be elected? Questions such as these have always been deemed fundamental, and what, indeed, could be more fundamental than the definition of legitimate power? What was decided was the substantial sovereignty of the people, the strict control of the source of all past anxieties, the Executive, and a short term for the legislature.

2. The second most constant written fundamental, though I hesitate to place its advent earlier than security from arbitrary taxation, was Religious Freedom.<sup>2</sup> This appears in the Agreement of the People; it assumed diverse and queer forms in the American Colonies, and came to a wellnigh perfect maturity in the constitutions of the American States and the Federation.

3. The third is Security of Property. The earliest form of this fundamental was 'no taxation without Parliamentary consent.'<sup>3</sup> It later assumed an importance, not as against an absolute King, and in the form of taxation, but as the individual's right to do as he liked with his own, without regard to, and without control by, the community.

4. There is Liberty: meaning (a) freedom from arrest and detention unless on well-known principles and with safeguards against official arbitrariness,<sup>4</sup> (b) freedom of opinion, especially in the form of written utterances, and this was first proclaimed in the Virginia Declaration of Rights:<sup>5</sup> (c) trial by jury<sup>6</sup> and equality before the law.<sup>7</sup>

<sup>1</sup> If, of course, we go back as far as Magna Charta we shall find that it is one of a defence against arbitrary interference with property and personal liberty.

<sup>2</sup> Gooch, *English Democratic Ideas in the Seventeenth Century* (1927); Figgis, *Studies in Political Thought from Gerson to Grotius, 1414-1625* (1923); Tanner, *English Constitutional Conflicts of the Seventeenth Century* (1928).

<sup>3</sup> 3 Car. I.c. (The Petition of Right): 'that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or suchlike charge without common consent by it of Parliament'.

<sup>4</sup> For example: 39th Clause of Magna Charta, Habeas Corpus Act of 1679 and the amending Act of 1816.

<sup>5</sup> The Press had by that time given a new problem to political society; could Milton's noble plea, 'Give men the ability to know, argue, and utter freely' be admitted, where opinion could be so widely spread so rapidly?

<sup>6</sup> Cf. Holdsworth, I (3rd Edition), 312, 320; the development of the system is treated at length in the subsequent volumes.

<sup>7</sup> e.g. in *Danby's Case*, 11, S.T. 599 (1679), it was decided that a Minister of the Crown cannot plead the orders of the Crown as an exemption from liability for an illegal action. In accordance with the Bill of Rights (1688) the Crown can no longer dispense with the provision of Acts of Parliament in favour of individuals. By the Act of Settlement (1700) a pardon by the Crown is not a bar to an impeachment in the Commons. The argument of 'State necessity' and the distinction between State officials and others were dismissed by Lord Camden, C.J., in 1765. (*Entick v. Carrington*, 19 S.T. 1067): 'The common law does not understand that kind of reasoning, nor do our books take any notice of such distinction.'

The French constitutions expanded these fundamentals, including new ones and re-shaping the old.<sup>1</sup> State honours and employments were opened to all without any other distinction than that of their virtues and talents: privilege was banished from the administrative as well as the legislative branch. Taxation ought to be divided equally among the members of the community according to their abilities. The right to property, being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of 'a previous just indemnity'. Finally, 'The society in which the guarantee of rights is not assured, and where there is no separation of powers, cannot be deemed to have a constitution at all.'

*Duties—correlative to Rights.* Until 1791 the dominant note of these fundamental political institutions was individual resistance to oppression, and the guarantee of individual rights. This tendency continues awhile. But already in 1793, the Community and the Duties of Man make their quiet appearance, not indeed to cry down that obdurate expression of individual claims, but as a friendly visitor, of whom much may yet be heard. 'Liberty', says the French Constitution of 1793, 'is the power belonging to man to do everything which does not encroach upon the rights of others: its principle is justice, its safeguard, the law; its moral limit is in this maxim: *Do not do unto others what you would not have them do to you.*' The right of property is expressed in a confident form: it is the right to 'enjoy and to dispose of his goods, his income, the profits of his labour and industry at his complete discretion (*à son gré*)'. And freedom to labour comes as a reaction from the police-state. 'No kind of work, crop or commerce, may be forbidden to the industry of citizens.'<sup>2</sup> There was added the article that poor relief was a sacred debt, that society owed assistance to poor citizens, either by providing work or by giving relief to those who were unable to work.<sup>3</sup> Public education was declared to be a social necessity and the State sworn to provide it.<sup>4</sup>

Again came the harsh voice of duty into this fair land of fundamental rights: 'There is oppression against the body social when one of its members is oppressed; there is oppression against every member when the social body is oppressed.'<sup>5</sup>

By 1795 the fundamental propositions included not only rights but duties; they were embodied in the Declaration of Rights and Duties of Men and Citizens.<sup>6</sup> All the rights we have so far read were

<sup>1</sup> The following are paraphrases from the Declaration of the Rights of Men and Citizens of 1789-91.

<sup>2</sup> *Ibid.*, Art. 17.

<sup>3</sup> *Ibid.*, Art. 21.

<sup>4</sup> *Ibid.*, Art. 22.

<sup>5</sup> *Ibid.*, Art. 34.

<sup>6</sup> Constitution of 23 September 1795.

reproduced, but attached to them was a little charter of nine articles entitled 'Duties'. They are in fact the indispensable basis of the rights if these are to be more than mere paper promises, but they fall with a leaden weight after the optimism of the earlier years.

Society, it is said, cannot be maintained unless those who compose it both know and perform their duties. Nature has engraved in the hearts of men two principles from which all the duties of man and citizen are derived: Do not do to others what you would not have them do to you: and, constantly do unto others the good you would like to receive from them. All must defend, serve and live subject to the laws, and respect those who are their agents. He is not a good citizen who is not a good son, brother, friend and husband. (Women are omitted.) One must religiously and frankly observe the laws, to be a good man. If you do not break the laws, but evade them by cunning, you injure the interest of all. . . . And so on. The constitution of November, 1848, goes further in setting out the details of that obedience to moral and prudential considerations which alone can give substance and energy to the fundamental political institution created to implement rights.

*Germany*, 1848. Some extension of the scope of fundamental institutions was made in the German Constitution of Frankfurt, 1849. In the German States, individual freedom had been particularly repressed by the operation of the Metternichian system since 1815, and therefore the instinctive reaction of the assembly and various groups of liberals and Republicans before the Assembly met, was to declare those things which were more fundamental even than organs for the exercise of sovereignty. They were interested, first, in the substance of State activity, its direction and purpose, and only secondarily in the division of power between Monarch and people, Parliament and Bureaucracy, States and Federation, and so spent the first six months—almost the only six months of their authority—in discussing and promulgating the Fundamental Rights of the German People.<sup>1</sup> The fact that there were 107 professors and teachers in an assembly of 541, and 182 lawyers, doubtlessly determined the pedantic attention to these fundamental reports.<sup>2</sup> Unfortunately, principles without institutions are constitutionally valueless, though they have some political value in their educative effect, a

<sup>1</sup> *Die Grundrechte des deutschen Volkes* (Grundrechte being used for the first time in this Assembly). The argument in the Assembly is naturally to be found without bias only in the *Stenographische Bericht Über die Verhandlungen der deutschen Konstituierenden National-versammlung zu Frankfurt a. M.*, by F. von Wigard, 9 vols.; a good account is given in Eckhardt, *Die Grundrechte vom Wiener Kongress bis zur Gegenwart*, Breslau, 1913; and more concerned with the legal effects of these rights is Giese, *Die Grundrechte*, Tübingen, 1905.

<sup>2</sup> Cf. Rosenbaum, *Beruf und Herkunft der Abgeordneten*, 1847–1919, p. 51 ff.



belief which in fact caused many to support the employment of valuable time on their discussion.<sup>1</sup>

Individual freedom and the need for civic order were very consciously balanced. The chief formulae were: free movement and equal civic rights over the whole territory of the Reich, the abolition of capital punishment, the inviolability of private dwellings, secrecy of post, freedom of opinion by word, writing, print and pictorial representation, and security of freedom of the press from censorship forfeits, denial of postal facilities, forfeits and other such devices, and trial by jury for press offences. Religious freedom was carefully defined; free education was publicly guaranteed and the position of the Churches thereto regulated; science and teaching were declared free; the rights of petition (for corporations as well as for individuals), of peaceable assembly without special permission, and of association, were guaranteed: intellectual property was to be protected: landed property was subjected to a most complicated set of clauses, to free land for use from ancient prohibition and obligations, and to rid small proprietorship of the feudal obligations. More freedom was to be given to local authorities, and administrative law was set about with proper safeguards by the appropriate differentiation of justice and administration.

The new things that entered into this constitution, can be classed under four heads: those issuing from the onset of capitalism, those from government by public opinion, those from the anti-bureaucratic trend of thought, and those from the growth of rationalism. It is interesting to see the constitution slowly catching up with developing civilization. Manufactures needed factory workers and for these combination was the first condition of freedom. The people and the Press were becoming a power, they needed freedom to attain their fullest development. The anti-bureaucratic creed was based on local self-government, and as the powers of the State grew this was considered more and more important both for liberty and efficiency; and justice was considered in jeopardy while in the hands of departments whose professional bias and interest it was to judge in their own favour.<sup>2</sup> Finally rationalism and the notion of progress made for the separation of Church and State, religious tolerance, and public education.

The Assembly and its constitution were swept away; but some clauses were included in the ordinary laws of some of the German States, and many were put into the constitution of 1919. The episode is interesting only, in this context, for the instinctive recognition of the necessity of fundamental principles and for the evidence of responsiveness to the social life of the nineteenth century.

<sup>1</sup> Cf. Freund, *Standards of American Legislation*, Chap. I.

<sup>2</sup> Upon this see further the chapters on the *Separation of Powers*, *supra*, and *Legal Remedies against Public Administration*, *infra*.

*The Weimar Constitution.* The next stage in the development of the substance of written constitutions took place after the Great War, when old hierarchies fell, and national entities embodied in alien States were withdrawn therefrom, and given an independent State life. In the new constitutions can be seen the unmistakable impress of the industrial revolution and the political institutions which have issued from it, hitherto hardly noticeable, even if at all inscribed in the documents. The German Constitution of 1919 is the fullest: it has the most complicated social life to serve.

First, then, the organizatory parts of the constitution. The states which make up the Federation are empowered, and in some cases obliged to amalgamate in order the better to serve the economic and cultural welfare of the whole nation.<sup>1</sup> We live in the day of large-scale economic organization, and many sentimental barriers to the triumph of the great state still exist. The spirit of this article of the constitution is that the joy in the cultural separateness of the small state may be bought at too high a price of disutility to others.

In Parliamentary organization the (three generations' old) movement for the representation of minorities<sup>2</sup> bears its fruit in the establishment of Proportional Representation for all elections, Federal, State and local.<sup>3</sup> A particular obstinacy is revealed in the declaration that members of Parliament are representatives of the 'whole people', and bound by their consciences and not by instructions.<sup>4</sup> This pronouncement first appeared in the earliest French constitution and has been slavishly imitated by most European constitutions since.

Experience in other countries having shown that between Parliamentary sessions, the day-by-day administrative work is unwatched, a Parliamentary supervisory committee is established to sit between sessions to act as administrative invigilator.<sup>5</sup>

Then, foreign affairs are controllable more closely than elsewhere by Parliamentary committees; <sup>6</sup> cabinet government is regulated to an unusually fine degree; arrangements are made for a state of emergency when internal or external dangers threaten; direct government is introduced as a corrective of Parliamentary omnipotence;<sup>7</sup> the budget system is elaborately organized;<sup>8</sup> and exceptional attention is paid to the maintenance and administration of railways and canals, subjects of importance to all modern countries, but of special importance to Germany owing to her position as the railway station and seaboard of Central and North-Western Europe.<sup>9</sup>

A branch of the constitution which is elaborated with a detail

<sup>1</sup> Cf. Chap. X, *infra*.

<sup>2</sup> Cf. Chap. XIX, *infra*.

<sup>3</sup> Art. 22.

<sup>4</sup> See Chap. XV, *infra*, for what has come of this.

<sup>5</sup> Art. 35.

<sup>6</sup> Arts. 35 and 45.

<sup>7</sup> Arts. 54-9 (regulating cabinet government); Art. 48 (providing for a state of emergency); Arts. 72-6 (prescribing the use of the referendum and the initiative).

<sup>8</sup> Arts. 85, 86, 87.

<sup>9</sup> Arts. 89-101.

and care seldom observed in other constitutions is the Civil Service,<sup>1</sup> and this for two reasons peculiar to Germany: to preserve the capacity of the Service, the best legacy of centuries of absolutism, and to make the service democratically sensitive and responsive. Incidentally, there is in Article 130,<sup>2</sup> one of the very rare allusions to political parties, which in fact, though not in law, constitute the central engines of modern politics.

The second part of the constitution, on the *Fundamental Rights and Fundamental Duties of Germans*, is of exceedingly wide range, and is divided into five sections: I. The Individual;<sup>3</sup> II. Social Life;<sup>4</sup> III. Religion and Religious Associations;<sup>5</sup> IV. Education and Schools;<sup>6</sup> and V. Economic Life.<sup>7</sup>

The principal novelties of the First Section are the equalization of the status of women with that of men, the guarantees for cultural minorities, the extension of secrecy of the mail to the telegraph and telephone, the uncompromising proclamation of freedom of opinion.

Section II is of principal importance as a code of family life. Marriage, it says, is the foundation of family life and the maintenance and increase of the nation, and rests upon the equal rights of both sexes; the purity, health and social welfare of the family must be maintained by the State and the local authorities, while large families and motherhood have a claim to State protection and care. It is the parents' supreme duty and right to nurture their children to physical, spiritual and social competence, and the State is to watch over this. Children not born in wedlock are to receive the conditions of a good upbringing, under equal conditions with legitimate children. Youth is to be protected, by State and local authority, against exploitation and moral intellectual or bodily neglect. . . .

Then the rights of association within the limits of the criminal laws are granted.

Section III guarantees to religious associations the exercise of their faith, forbids any establishment,<sup>8</sup> prohibits religious societies from endangering the unity of State life by privileges, and seeks to neutralize the effect of religious conviction whatever its quality, upon the State, by excluding religious considerations from appointments to office, either as a qualification or as a disqualification. The German Civil Service was before the War hardly open to Jews, or Roman Catholics or professed atheists.

<sup>1</sup> Arts. 39, 128, 129, 130, 131.

<sup>2</sup> 'Officials are servants of the community, and not of a party.' This, as well as the whole position of the Civil Service in the modern State, is discussed *infra*, Part VII.

<sup>3</sup> Arts. 109-18.

<sup>4</sup> Arts. 119-34.

<sup>5</sup> Arts. 135-41.

<sup>6</sup> Arts. 142-50.

<sup>7</sup> Arts. 151-65.

<sup>8</sup> Cf. Giese, *Staat und Kirche im neuen Deutschland* (*Jahrbuch des Öffentlichen Rechts*, Vol. XIII, 1925).

Section IV is an educational code. It begins with a declaration which is very dear to German teachers since it has so rarely been practised: 'Art, science and their teachings are free. The State guarantees their protection and participates in their promotion.' This was first declared in the Frankfurt Assembly's declaration in 1849, very naturally since its most eminent members were professors, lawyers and journalists, when Treitschke spoke in its favour. Apart from its accidental relationship to German conditions, the declaration is significant as an expression of confidence in the modern deities—Invention and Science.

The remainder of the Section analyses each part of the educational system: its purposes, its organizations, its teachers, the length of time for which children are obliged to attend school—for eight years and then continuation school until the age of 18—the position of private schools, and of schools for those with a special religion or *Weltanschauung*, religious instruction.

The general aim of the educational system is peculiarly germane to a discussion of the modern State. When so many hostages are given to the individual and to religious and economic associations some provision must be made for a consensus of opinion. It is not here maintained that these articles can achieve this, nor that the reverse may be the result: but the necessity is patent. Article 148 says: 'All schools shall try to achieve moral training, civic conscience, personal and professional competence, in the spirit of the German people and of international friendship. In education in State schools care must be taken not to wound the sensitiveness of the unorthodox. The curriculum must include instruction in civics and economic organization. Every student receives a copy of the constitution at the end of his school years.'

Finally, Section V, on Economic Life, goes further than any other constitution, and is an interesting reflection of those fundamental aspects of modern economic life analysed in previous chapters.<sup>1</sup>

The keynote is set by the first Article, 151, which runs: 'The ordering of economic life must correspond to principles of justice with the aim of securing an existence worthy of human beings. Within these limits the economic freedom of the individual is to be secured. Legal compulsion is only permissible for the realization of threatened rights or in the service of the paramount necessities of the common good. The freedom of commerce and trade is to be guaranteed in the measure laid down by Federal laws.' The tone is maintained all through this section, and the subsequent articles are instrumental to the first. There is in these articles more than a reaction from *laissez-faire*, there is conscious acceptance of positive principles of collectivism, in some cases attaining to the point of nationalization of industry.

<sup>1</sup> See especially Chap. II, *supra*.

Here is the maturity of that social theory which regards the attainment of a respectable minimum of economic welfare for all, as prior to any freedom or exceptional riches for more capable or fortunate individuals.<sup>1</sup> There is less certainty than of old about the absolute value of private property, and the constitution recalls that 'Property obliges. Its use should also be of service for the social best'.<sup>2</sup> Rights of inheritance are not absolute; the State's share therein is unequivocally announced. Nor is the use of landed property left to the tender mercies of individual choice and chance, but the State's supervision over its distribution and use is proclaimed, and the conditions of expropriation for public purposes are stated. The owner is expected to remember that the cultivation of the land has social effects and it is his duty to see that these are best subserved; and unearned increment in the value of land is confiscable. All mineral resources, and all economically useful natural forces are under public vigilance, and private royalty-rights are to be transferred to the State.<sup>3</sup> The possibility of socialization, planning of industries, amalgamation by the states or the local authorities, is announced, as well as the regulation of import and export prices (in other words, consumption) on social principles; and the co-operation of vocational associations in such activities is provided for. A uniform labour code for the Federation is to be created by law, and its essential principle is that labour power is specially protected by the State. Large rights to associate for the amelioration of conditions of work and economic reward are granted to all people and professions, and measures and agreements restricting these rights or seeking to do so are declared illegal. A complete system of social insurance—sickness, accident, motherhood, old age, etc.—is to be established.

Then follows the inevitable consequence, whether written or unwritten: '*that every German has the moral duty to engage his mental and bodily strength so as to promote the welfare of the community*'.

The final article in the section on Economic Life is Article 165, which creates a scheme of representative bodies for the government of industry and agriculture. This scheme is designed to give employees equal rights with employers in each works, for each district, province and State. All this finds its summit in a great central body—the Economic Council—representative of workers, employers, consumers and others, to ensure peace in industry, justice to all vocational groups,

<sup>1</sup> See for the evolution of this doctrine and for some aspects of it, Chap. II, *supra*.

<sup>2</sup> Art. 153.

<sup>3</sup> Cf. Reports of the British Coal Industry Commission, 1919, Cmd. 359, 360, 361. Report of the Royal Commission on the Coal Industry (1925), 1926, Cmd. 2600. *Britain's Industrial Future*—being the Report of the Liberal Industrial Inquiry, London, 1928. It should be observed that this in England would be done by ordinary statute law and would not be specially dignified by the title of a constitutional law.

and to advise the political authorities on measures of economic and social importance.<sup>1</sup>

*Implications.* We have observed the development of the substance of the constitution from the time when there was no substance except the vague notion of royal absolutism to the point where it mirrors, if with some distortions and omissions, the multifarious convictions, habits, and social institutions of a complicated civilization. Further emphasis of some aspects of this development is necessary.

First, what is fundamental is necessarily the result of evolving civilization. There are no fundamentals capable of standing proof against time, except entities so vague as to be meaningless. If the principles which have been indicated were reduced by the abstraction of their temporary and local forms we should arrive at the most primitive human instincts; such as the infant's hold upon its nurse for fear of falling, and the irrational resistance to physical constraint.<sup>2</sup> Men will always search for the guarantee of the fundamentals in their own civilization, since these have insensibly taken on the urgent character of such primary reactions. Stability and change, settlement and flux must then be expected, and men will constantly hover between the extremes and struggle for their fixture in constitutions. And the lesson of it all is that there is nothing so fundamental that it may not change, and nothing so fundamental that it ought not to change; nor anything so fugitive that it may not be one day fixed and worshipped as an absolute dispensation.

Secondly, society does not wait until a constitution is written. In proportion as matters are urgent it establishes fundamentals between constitutions (when there is a series), by laws or by conventions; and what the constitution does not include is provided outside its pages. The institutions created without constitutional benediction may be so embedded in the vital desires of men as to be able to persist as fundamentals, and even when the paper fundamentals are swept away, or even where these do not exist. In the U.S.A. the President has come to be elected *directly* by the people, and the party system is fundamental to democratic government; the former was virtually forbidden by the constitution, the latter is ignored by constitutions but nevertheless is everywhere the real centre of government; British Trade Union rights are not derived from any constitution, nor are freedom of speech, writing and assembly, yet they are so fundamental that any attempts substantially to limit them meet with the strongest resistance. Constitutions do not include all that is fundamental, while many of the declared fundamentals are silently ignored.

<sup>1</sup> Cf. Chap. XVIII, *infra*.

<sup>2</sup> Cf. J. B. and R. A. Watson, *Psychological Care of Infant and Child* (Allen & Unwin), 1928.

Lastly, are they fundamental in the sense of being perfect traps ; are they really indefeasible and inalienable ? No constitution has shown that fundamental means this. They are defeasible, alienable and escapable, and the People, the Parties, the Parliaments and the Courts of Justice have defeated them, alienated them and escaped them. They have appeared to be all these and more to their framers, because of mankind's desire for order, the impossibility of living in constant flux, the belief that it is possible to express the government of society in a few wise pages covered with pregnant words, and the recurrent human confusion of that which is characteristic of their generations and the past with that which can properly be for all time.

Constitutions do acquire a special stability and reverence, but the latter passes with time and the former depends entirely upon the factors forming civilization, now one aspect of man's nature, now another, being awakened by some fresh property of the spirit or Nature. Constitutions remain unchanged in proportion as the basic elements in human nature are socially acknowledged as good ; secondly, in proportion to the completeness with which these socially valid elements are embodied in the constitution, and thirdly in proportion to the *generality* with which these elements are described, since if they are described in detail amendments are often required.

Referring more particularly to the German Constitution of 1919, though this is true of all constitutions, many of the clauses are so generally worded as to have no effect until the clauses are interpreted by the competent authorities, and, again, until laws are passed to give them precise definition. In the first class are some, equality before the law, equality between the sexes, the freedom of science and art, the protection of the middle class and of family life, so vague, so possible of multiform interpretation, that the mind pauses before them completely bewildered. Already discussion in Germany has raged around the meaning of these : what is their substance and what are their limits, and how far have they the effect of law, how far are they merely aspirations ? <sup>1</sup> Nothing in the constitution provides those to whom are granted rights with a legal institution to secure the execution of the claim. All their efficacy depends upon their future interpretation and application in statutes and judicial decisions. There is another class which avowedly waits upon legislation : the Labour Code, the Economic Council, Property Law, and Local Government are examples. The makers of the constitution expected, however, that the laws would at least not be destructive of those principles, and would be a positive mould into which legislative activity would run.

<sup>1</sup> Nipperdey, *Die Grundrechte*, Vol. I, Introduction by Thoma ; cf. also Anschütz, *Kommentar*, Introduction to Part II, and Buschke, *Die Grundrechte der Weimarer Verfassung in der Rechtsprechung des Reichsgerichts*, Berlin, 1930.

What these rights and duties mean, then, is not stated in the constitution. They can be taught in the schools of law and political science, broadcast by political parties and the Press only in their vaporous form, and all they can do is to focus the mind upon their significance, and provoke thought. But their meaning can only be obtained from the study of their history and the reasons why men fought for them and deemed them of such moment that at a particularly solemn moment of the nation's life they were included in a document designed to be the basis of political behaviour. And to different individuals, classes, interests and schools these do, and will, unavoidably bear a widely varying message. We have seen, for example, that the issue has not been irrevocably settled whether in Germany interpretation shall be decided by judicial bodies or by Parliament. Officials take an oath to maintain the Constitution, but it is not known exactly what is to be respected. Until the issue is settled who interprets, and until the Courts, the Parliament and the People speak with a more certain voice, the answer to the question, what is the living worth of the constitution? is—we do not know, it is yet to appear. We have even seen the possibility of amendment challenged as unconstitutional in the U.S.A.<sup>1</sup>

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<sup>1</sup> So uncertain are the foundations of the American Constitution that even the question of the unconstitutionality of an amendment to the Constitution, carried out with due regard to the method and majorities prescribed in Article V, has been raised. It is argued that the spirit of the Constitution, and certain clauses, are the measure of the reasonableness of an Amendment, and that these constitute 'inherent' limitations. What are the bases of this argument? They have been given in the National Prohibition Cases (1920), and a number of learned articles in the law Journals.\* (1) The Amending Power is a *delegated* power, like all the powers in the Constitution, and therefore may be exercised only in the spirit of the delegation. (2) This spirit is that (a) Amendment does not mean such alterations to the Constitution as destroy its original character. (b) That its original character includes as its very essence 'a perpetual Union of States'. Now, it is argued, any amendment which deprives the States of their character as States abolishes a perpetual Union of States; and such an invasion of the Police Power of the States is quite clearly a destruction of the State-power to such an extent that their State-character is lost. Such reasoning had been used in a number of cases to prevent the encroachment of the Federation on the States. Further, the result of long attrition of State-power would be to destroy the identity of the States which, by the last sentence of the amending articles, are guaranteed perpetual and equal representation in the Senate. A time will come, in short, when there are no States to be represented, and that is not constitutional. (3) Nor does the Constitution intend that ordinary legislation shall be embodied in it by Amendment, for this takes away from the freedom of later generations, which was not intended by the Constitution-makers, who were only thinking of Amendments for the governmental machinery, not additions to the Constitution directly affecting the behaviour of citizens.

It will be seen that these arguments are ostensibly based upon the belief that the Constitution-makers meant this form of government to persist, and no other, and that the State-Federal relationship is to be narrowly construed. All that can be said in answer to this is that the Constitutional Convention outvoted a motion

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\* e.g. Marbury, The limitations upon the Amending Power, *Harvard Law Review*, XXXIII, 223; Frierson: A Reply to Mr. Marbury, *ibid.*, 659.



Thus it must be with every new constitution : it has its period of infancy, when all hopes are set upon it, when guesses are ventured about its future, guesses to which only long years can give even an incomplete answer.<sup>1</sup> In the older constitutions the life of society has sufficiently shown that the constitution is its sport, amended, interpreted and evaded in the long run like other laws, and differing from these in the reverence and loyalty accorded it, only in degree and lip-service. That degree of difference and lip-service are of some political importance, for they betoken that probably a little more fuss, manoeuvre, deliberateness, and watchfulness, may accompany the conscious reform or conservation of 'fundamental' political institutions.

to stop amendments affecting the 'internal police' of a State. It also seems stupid to attempt to put a Continent in a strait-jacket in the days of Relativity and the Atom. There is positive evidence, too, that the convention contemplated wide changes. Moreover, no student of its records can fail to see that the Constitution-makers were themselves at a loss to know what exactly was the nature of association they had established.

Then, the argument respecting the content of the Amendment is rather weakened by the fact that the 13th, and parts of the 14th and 15th Amendments, are of this character and for nearly fifty years have received silent acceptance.

Finally, as Willoughby points out, these assertions that the Constitution is in the nature of an agreement or compact between *States*, and not between the people of the States are erroneous (*The Constitution of the U.S.A.*, Chapter, *The Amendment of the Constitution*).

The Supreme Court in its decision in the *National Prohibition Cases* did not, as usual, give an opinion, but simply concluded that the 18th Amendment, which evoked the aforementioned attacks, 'is within the power to amend reserved by Article V of the Constitution'. It is held by Constitutional jurists that this means that the Court rejects the arguments in favour of inherent limitations on the amending power.

Still dissatisfaction remains that legislation on intoxicating liquors was made part and parcel of the Constitution, since this makes legislation less responsive to popular desires than the legislatures usually are. That issue, however, we have already discussed elsewhere.

<sup>1</sup> Cf. Justice Story in an early case: 'The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for specifications of its powers or to declare the means by which those powers should be carried into execution. It was foreseen that this would be perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter, and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects and to mould and model the exercise of its powers as its own wisdom and the public interest should require.'—*Martin v. Hunter*, 1 Wheaton, 326. (*The Constitution* (annotated), 1924, Senate Document No. 154, 68th Congress, First Session, p. 43.)

## CHAPTER VIII

### THE CENTRAL-LOCAL TERRITORIAL FABRIC OF THE STATE (FEDERALISM)

THE State necessarily occupies a territory. The problem at once arises how best to manage the area ; whether to govern it undividedly from a single centre, or to disintegrate it and govern by a concert of central and local authorities ; whether, also, the area of undivided rule should at any time be extended or diminished. These problems are not confined to the State ; they arise in industrial and commercial concerns, in Trade Unions,<sup>1</sup> in Churches.

The problems have usually been discussed under the time-honoured divisions of Federalism and Local Government, but these are only subdivisions of the main problem of the territorial composition of the State. No issues different in kind can be raised in regard to the one or the other, and in fact, the same issues are traceable in and are determinant of such questions as Regionalism, Devolution and International Government. Here is a brood of difficulties and devices of State all of the same strain ; they are differentiated by size, urgency, time and place. In a future work we shall be concerned with the particular examples of Local Government and Regionalism ; but in this work, owing to the large range of subjects, we are obliged to confine ourselves to the problem of Federalism, at once a study in the efficiency of government, the component factors of nationality, and the distribution of sovereign power.

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What we wish to discover here is (a) the amalgam of motives and environmental factors which cause large states to be composed out of small ones, or to be decomposed by the transference of powers to smaller areas within them ; and (b) the organization adopted and its reasons.

The prevailing distinction between states is that between the

<sup>1</sup> S. and B. Webb, *Industrial Democracy and The Consumers' Co-operative Movement*.

Unitary and the Federal State.<sup>1</sup> In this distinction the Unitary State is one in which all authority and power are lodged in a single centre, whose will and agents are legally omnipotent over the whole area, while a Federal State is one in which part of the authority and power is vested in the local areas while another part is vested in a central institution deliberately constituted by an association of the local areas. Once a general name is given to a number of particular things in order to distinguish them from others, these things acquire a reputation for a distinction they do not in fact possess. For all Unitary States relax the severity of the central government, while in some actual forms of Federalism there is more centralization than the name originally implied. There is, in short, in actual states and in their constitutions, a wide range of systems, never ending in a completely unitary one, but ascending towards the one or other extreme type.<sup>2</sup>

**Development of American and German Federalism.** Federalism is of extreme modernity. Its theory and practice in the Modern State are not older than the American Federation, which came into existence in 1787. The Federal idea, that is, *the plan of government of a number of contiguous territories in association and neither in separation nor in one compound*, was ancient and had been practised in Greece.<sup>3</sup> Although the Fathers of the American Constitution referred to Greek theories and experience, the assembly well knew that it was building for the first time. The next examples of Federalism were Switzerland in 1802<sup>4</sup> and Canada in 1837 and 1867<sup>5</sup>; Germany in 1867 and 1871; the Commonwealth of Australia in 1902,<sup>6</sup> and the Union of South Africa in 1905.<sup>7</sup> Much scholarship has been expended on the history of the establishment of these Federa-

<sup>1</sup> Bryce, *Studies in History and Jurisprudence* (2 vols., 1901), Essay IV; A. V. Dicey, *Law of the Constitution* (8th Ed., 1927), Introduction, Sect. III; H. Sidgwick, *The Elements of Politics* (1891), Chap. XXVI; Brie, *Theorie der Staatenverbindung und Geschichte des Bundesstaates*; Jellinek, *Die Lehre von den Staatenverbindungen* (1882); Preuss, *Gemeinde, Staat und Reich*; Ebers, *Die Lehre vom Bundesstaat*. The more up-to-date treatises are referred to in the course of the present discussion. *The Federalist, A Commentary on the Constitution of the United States—a collection of essays* by Hamilton, Jay and Madison; Story, *Commentaries on the Constitution of the United States*, 2 vols. (5th Ed., 1891); Willoughby, *The Constitutional Law of the United States* (2nd Ed., 3 vols., 1929). Cf. Mogi, *Theory of Federalism*, 2 vols., for a history of federal theory.

<sup>2</sup> Kelsen, *Allgemeine Staatslehre* (1925), Chap. VI.

<sup>3</sup> Freeman, *Federal Government in Greece and Italy* (2nd Ed., 1893).

<sup>4</sup> Fleiner, *Schweizerisches Bundesstaatsrecht* (1923), and see bibliographies: Introduction and Chap. I.

<sup>5</sup> Bradshaw, *Self-Government in Canada* (1903); Kennedy, *The Constitution of Canada* (1922); Leroy, *Canada's Federal System* (1913), and *A Short Treatise on Canadian Constitutional Law* (1918).

<sup>6</sup> Wise, *The Making of the Australian Commonwealth* (1913); Moore, *The Constitution of the Commonwealth of Australia* (2nd Ed., 1910); Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901).

<sup>7</sup> Brand, *The Union of South Africa* (1909).

tions and all the details are easily accessible. We therefore abstract the quintessential motives and events, with the simple warning that the events and motives were not so well-ordered or always avowed as they appear to be in an organized summary. Our examples are the U.S.A. and Germany.

**The United States of America.** Before 1789 the thirteen American Colonies led an existence largely independent of each other; the states at the extremities of the Atlantic seaboard were months, and those between, weeks and days away from each other.

The states were differentiated by their climate, their commercial and industrial interests, by religion, and these brought about secondary differences of culture.<sup>1</sup> But there was a substantial uniformity of cultural outlook and political tradition when compared, say, with Germany. The earliest tie was *defence*—against the Indians and European claimants to the hinterland of North America.<sup>2</sup>

Penn wished to secure a common council to adjust differences and complaints among the states as in commercial injuries and the mutual rendition of debtors and culprits who fled from justice, and to support the union and safety against common enemies. In Franklin's scheme a further motive was the settlement of lands acquired from the Indians. The vast hinterland, full of disturbing potentialities, was a factor of unique urgency in America as a problem whose menace demanded union for its peaceful solution.

The Imperial theory which assigned to the American Colonies the position of plantations for the benefit of the Mother Country was not violently challenged until it began to be applied with real energy by Grenville and Townshend.<sup>3</sup> Defensive resentment began to produce unity: 'There ought to be no New England men, no New Yorkers known on the Continent, but all of us Americans.'<sup>4</sup> England under Lord North persisted; war followed. The Second Continental Congress met in 1775 to conduct the struggle. The Declaration of Independence was promulgated.<sup>5</sup> The colonies drew together in common

<sup>1</sup> C. and M. Beard, *The Rise of American Civilization* (1928); V. L. Parrington, *Main Currents in American Thought*, I, *The Colonial Mind*, 1620-1800.

<sup>2</sup> For example, as early as 1643 the New England Confederacy was formed. Here was a solid block of States not over-far from each other and very similar in political organization and religious conviction. The union was 'a firm and perpetual league of friendship and amity, for offence and defence, mutual advice and succour upon all just occasions, both for preserving and propagating the truths of the Gospel and for mutual safety and welfare', p. 45, Macdonald, *Source Book of American History*; Fiske, *Beginnings of New England* (1889), Chap. IV; J. S. Brown, *The United States: A Study in International Organization*; Smyth, *The Writings of Benjamin Franklin*, III, 210 ff.

<sup>3</sup> Lecky, *A History of England in the Eighteenth Century* (New Ed., 1892), IV; see also Smith, *The Wealth of Nations* (Cannan's Ed., 1904), Bk. IV, Chap. VII, Pt. III; Trevelyan, *The American Revolution*; Carl Becker, *The Declaration of Independence* (1922), Chap. III, and Van Tyne, *The American Revolution*, 1776-83 (*American History*, ed. by Hart, IX); MacDonald, *Source Book*, pp. 136-40.

<sup>4</sup> And see Hart, *American History told by Contemporaries*, II, 394-412.

<sup>5</sup> Cf. Becker, *op. cit.*; Hirst, *Life and Letters of Thomas Jefferson* (1926).

consciousness, and for defence, of a righteous cause. They were now very self-conscious states, and were not anxious to relinquish their government into the hands of a new central authority. The Congress, therefore, was lamentably weak. The Articles of Confederation were not ready until 1777 and were not ratified by all the states until 1781. Only extreme danger had brought them together, and the authors of the Articles apologized for the rickets of their weak progeny.<sup>1</sup> The Confederation was announced to be a 'firm league of friendship'. It became a league of disgruntled independents. Sovereignty (legal supremacy) remained with the states; most illuminating was the fact that amendment of the Articles needed a unanimous vote. The powers conferred on Congress were few and strictly limited. Congress had no direct executive power to carry out its resolutions, but was obliged to rely upon the states for action. Most vital of all, Congress had no power to levy taxes, nor to regulate commerce.

The weakness of the arrangement was the inherent result of the very philosophy which had led to its creation, and of the natural conditions of the age. The liberty of the individual person and the independence of the locality are ever inwardly related.<sup>2</sup> The small states were afraid that the larger states would outvote and overrule them. Nor was man's environment such as immediately to commend the tremendous area of the United States as the 'natural' object of loyalty—for commerce, industry, culture, and men and women, travel, meet, and are one, only with the speed and continuity of the available means of transport. The amount of commerce was small judged by modern standards in this New World of farmers and village handicraftsmen; and mechanical transport which has since tended (but by no means succeeded) to make the whole world one did not exist. The first and natural impulse after revolution was self-help, not an associated and planned future.

The War ended, the remnants of the Congress silently dozed in an unheeded corner. Only a few people, like Alexander Hamilton or Rush of Pennsylvania, experienced the feeling that all America should be one—a feeling that was nourished on its own intrinsic merits and not on expectations of utility. 'We are now a new nation,' said Rush.<sup>3</sup> '... The more a man aims at serving America, the more he serves his colony. We have been too free with the word—independence; we are dependent on each other, not totally independent

<sup>1</sup> *Official Letter accompanying Act of Confederation, In Congress Yorktown, November 17, 1777* (reprinted in Elliot, *Debates in the Several State Conventions on the adoption of the Federal Constitution*, 2nd Ed., 1901).

<sup>2</sup> Parrington, *op. cit.*, I, 219-342; P. L. Ford (Editor), *Pamphlets on the Constitution of the United States published during its discussion by the people, 1787-8* (1892), p. 288 ff.

<sup>3</sup> Schuyler, *The Constitution of the United States* (1923), p. 38.

states. . . . When I entered that door, I considered myself a citizen of America.' So also Hamilton.<sup>1</sup>

**Economic Necessity.** But the many needed to be persuaded by tangible utilities, and the vital impulse to federation, now that foreign enemies were removed, was economic: commerce and contracts, tariffs and bills of credit. Congress owed much money and was even in arrears with its soldiers,<sup>2</sup> the states owed money, and had large quantities of depreciated paper money and bonds outstanding.<sup>3</sup> Each state was an independent commercial entity treating others to the expense, delays and vexations of tariffs. America was now excluded from the British mercantile system and as a foreign nation was subject to serious discriminations, competition, and hostility.<sup>4</sup> Separation made the states weak in commercial and boundary negotiations with the great countries of Europe, and Britain played upon their domestic jealousy.<sup>5</sup> Boundary disputes brought several states to the verge of war.<sup>6</sup> The settlement in 1786 of a conflict for the control of the hinterland between states fortunate in their situation and treaties, and therefore likely to grow large and dominant, and those perhaps destined to remain small and subordinate, had temporarily settled a question which might otherwise have made peace without subjection forever impossible on the American Continent: only a stable government could fully execute the policy laid down by the settlement.

The actual existence of a Confederation had already produced a literature of Federalism, criticizing the old articles for their weakness, and advocating a stronger union. The most brilliant and compelling of essays came from the pen of Hamilton in 1781 and 1782 called *The Continentalist*. But there were others<sup>7</sup> also. Exceptional men, like Hamilton, are always essential ingredients in the forging of states.

A few such men, foremost among them James Madison and George Washington, took advantage of unrest and distress, and a growing

<sup>1</sup> Cf. *The Federalist*, Nos. XV-XXII; and earlier in *The Continentalist*.

<sup>2</sup> Fiske, *Critical Period of American History*, p. 163 ff.

<sup>3</sup> Callender, *Economic History of the United States*, p. 185 ff.

<sup>4</sup> Fiske, op. cit.; Callender, op. cit., pp. 210-20.

<sup>5</sup> Cf. Lecky, op. cit., IV, 12.

<sup>6</sup> Cf. McLaughlin, *The Confederation and the Constitution, 1783-1789* (*American History*, ed. by Hart, X).

<sup>7</sup> Though Hamilton was, perhaps, too extreme in his views on government to become the acclaimed leader of a body like the Convention, his speech at least caused a wholesome consternation. There is yet another Webster, Peletiah by name, and he, in 1873, published *A Dissertation on the Political Union and Constitution of the Thirteen United States of North America*. It is probable that this had some influence in its time; for Madison calls him once, 'an able citizen of Philadelphia', later striking out the 'able'. At any rate, the historian Haines Taylor attempted to establish Peletiah's fame as the real creator, in theory at least, of the American Federation. Taylor's *The Origin and Growth of the American Constitution*. The claim is properly shown to be a web woven of every imaginable logical fallacy in Corwin, *Judicial Review, The Peletiah Webster Myth*.

expectancy of a 'more perfect union' to meet in 1786 to consider commercial conditions and report an amendment to the Articles of Confederation.<sup>1</sup> It reported that

*'in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limit, may require a correspondent adjustment of other parts of the federal system.'*<sup>2</sup>

The invitation to a convention at Philadelphia in May, 1787, was now not to consider 'commerce', but 'the situation' of the United States. The old Congress, which was still the symbol of defensive fraternity and national independence, also recommended a Convention 'to render the federal constitution adequate to the exigencies of government, and the preservation of the Union'.

**The Work of the Convention.** We cannot analyse the Convention or the negotiations which produced the clauses of the new constitution. Contrary to the present condition of the U.S.A., the finest minds and characters were then in politics.

Little dispute was raised by the powers to be granted to the Federal authority. Their nature explains their ready adoption. Such powers as those over foreign and interstate commerce, and commerce with the Indian tribes; naturalization and bankruptcy; currency and standards of weights and measures; postal administration; copyright; crimes on the high seas and offences against international law; foreign affairs in general; the declaration of war and maintenance of an army and navy, yield their greatest common utility with the least common effort when they are concerted over a large area. What that area shall be is determinable at any time by the existing state of invention and the organizing ability of mankind. Uniformity in commerce brings the well-known economy of free trade, in currency it saves delay and the chaffering of exchange, in posts it increases speed, in weights and measures it aids rapidity and certainty of calculation, in bankruptcy it enhances a sense of security, in copyright, protection, detective operations and retribution are made easier. A single administration of diplomatic negotiations and the armed forces adds weight to counsel, eliminates the waste involved in a number of separate armed forces, and reduces the chances of domestic conflict. These were the main utilitarian considerations that brought about the new Union, as they have been of every federation since, and we shall later see that it was on the path of such utilities that the unitary element in federation afterwards pursued its rapid way.

<sup>1</sup> *Proposition of the General Assembly of Virginia*, 21 January 1786 (reprinted in Elliot's *Debates*, I, 115-116), and cf. Schuyler, op. cit., p. 68.

<sup>2</sup> *Documentary History*, I, 1-8.

But just as decidedly other powers were not transferred to the U.S. and remained with the states ; indeed, the whole field of activity outside the transferred powers was left within their sphere.

The subjects of acute controversy were State representation in the Federal legislature, Federal power to act directly upon the citizens, instead of through the states as before, and the power to tax. The last two questions revolved almost entirely around the first. Supposing the power to tax were granted, or supposing the central authority were given the power of direct jurisdiction. What would be the position of the states in that policy ? would the power to tax be limited by their counsel as separate entities with a guaranteed life ? would they be enabled to withstand the direct power of the central authority, which was to be so crushingly enhanced ? No final decisions, therefore, were taken about other questions till the great issue—the place of the states in the Union—had been settled. The small states were afraid for their identity and preferred disruption of the Union to attenuation of their own sovereignty.<sup>1</sup>

‘The states and the advocates for them were intoxicated with the idea of their sovereignty.’<sup>2</sup> A compromise was reached,<sup>3</sup> and its character is considered in the next Chapter.

Thus federation in the U.S.A. was the resultant of a number of forces which pressed the states towards a partial union, but kept them strictly free in certain fields. There were great economies to be obtained from union, as well as the psychological value of large dominions, and the reduction of the number of war-like occasions. Why did union go no further ? Because, as we have seen, the representatives of the states were highly conscious of their separate identity and anxious to maintain it. They had not been sovereign long enough to realize that greater values may be obtained by subordination. There was little or no question of the United States at once taking over more powers : centralization with multitudinous activities was then physically impossible.<sup>4</sup> The states were not fighting against

<sup>1</sup> *Documentary History*, III, 125, 225, 228–35.

<sup>2</sup> Elbridge Gerry, representative of Massachusetts (*ibid.*, III, 244). Luther Martin of Maryland contended that ‘an equal vote in the senate was essential to the federal idea, and was founded in *justice and freedom, not merely in policy* ; that the states may give up this right of sovereignty, yet they had not, and ought not ; that the states like individuals were in a state of nature equally sovereign and free ; that there was and would continue a natural predilection and partiality in men for their own states ; that the states, particularly the smaller, would never allow a negative to be exercised over their laws. . . .’ Dickinson of Delaware : ‘Some of the members from the small states wish for two branches in the General Legislature, and are friends to a good National Government ; but we would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage, in both branches of the legislature, and thereby be thrown under the domination of the large states.’

<sup>3</sup> Cf. Ellsworth, representative of Connecticut, *ibid.*, III, 245, 247.

<sup>4</sup> P. L. Ford (Editor), *Pamphlets on the Constitution of the United States published during its discussion by the people, 1787–8 (1888)*, pp. 122, 288 ff. But see pp. 129, 207 ff., 247 ff.



such attempts at usurpation. But there was a real fear that their interests might be not only overlooked but purposely sacrificed by the large states; and there was the vague claim for *freedom*. Now freedom was not well defined. Did it not mean this: the larger the number of small areas of government the greater the opportunities for office? Office is not always coveted for its pecuniary sweets; many people show greater enthusiasm and even ferocity in their pursuit of office when it is unpaid than when it is paid. For office is power, and men love activity, to devise, and to administer,<sup>1</sup> and office lends social prestige. These are as dear, sometimes dearer, than all economic satisfactions, and men desire to retain them within their easy reach. Hence the tension between central and local government; hence the demand for freedom, and, finally, 'sovereignty'. In the American states, built upon local government, these sentiments were especially powerful. The habits established by men were considered as indestructible verities of Nature. Was more included in the notion of sovereignty? Perhaps simple local patriotism springing from sheer love of familiar surroundings.

Whether the Constitution would have the ratifying life breathed into it was doubtful enough. Its strong supporters were the mercantile classes and the liberal professions. They understood the need for the union and strong government. The mass of the people with small property and of little education were sorely afraid of autocracy and of—they knew not what. The farmers were not benefited by the Constitution as were the merchants and financiers; and there even developed a division between the more agricultural South and the more mercantile and industrial North. The economic reason for acceptance prevailed,<sup>2</sup> but even so the campaign was so violent and closely contested that members of one ratifying legislature had to be physically carried into the halls in order to make a quorum.<sup>3</sup>

When the vote had been taken and the constitution was established, what had been settled? What had happened to the states? Were they extinguished as sources of sovereignty or could they secede, could the union be shattered by the withdrawal of powers by the states? Who formed the Compact, People or States? A constitution, we have already learned, does not immediately settle all its problems; and fuller answers were to come only with time. For a federation is composed of sensitive elements, and to the difficulty of the plain equipoise between man and society is added that between derived entities, the States, and the Nation. By adding one more political institution it adds one more pride or aversion to the number

<sup>1</sup> This was a very important obstacle to German federalism, the strong bureaucratic and court circles of the states wishing to remain complete masters of political affairs.

<sup>2</sup> Cf. Libby, *The Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution*.

<sup>3</sup> McMaster and Stone, *Pennsylvania and the Federal Constitution* (1888).

erected by men to increase their own importance and establish their individual identity and corporate conceit. Bitter have been the occasions of conflict between the Federal and State sovereignty—over the Slavery Problem most of all; and every important law raises the difficulty over again, with variations; but apart from this the life of the U.S.A. has been singularly free from the major troubles of independent political societies dwelling side by side. From the beginning American Federalism was made comparatively easy and successful by the underlying uniformity of race and culture.

**Germany.** In the rise of the German Federation, second only to the U.S.A. in federal importance, the problems to be faced were vastly different: geography, economics, local culture, and political organization and traditions profoundly distinguished Germany from America, and, more imperious still, cut off one German state from another. Evolution, therefore, one of stress and violence, led to solutions expressly rejected in the American system. The differences serve the better to show the basic nature of federalism.

*Foreign oppression* was the earliest stimulus to the formation of a federal union of the Germanic states; and its consummation was after war against France in 1871 and 1919.

Before Napoleon and the French overran these territories, there were 1,800 independent political jurisdictions, including Austria. Kings, spiritual and secular Princes, Imperial Towns, Imperial Townships, Dukedoms, Abbots, divided up among them some 20,000,000 subjects.<sup>1</sup> Within the loose tie of the Holy Roman Empire they were jealous and separatist. Critics of the small states, like Lessing,<sup>2</sup> Schiller, Herder, Humboldt, Kant<sup>3</sup>—sought the form of a large nation but World-Citizenship, *Weltbürgertum*. The small estate owner in the country, the peasant, the urban citizens and handicraftsmen—the masses in short—lived in and for their immediate surroundings; the civil servants for their royal masters.<sup>4</sup>

**Particularism.** Nor were the facts of the German political system propitious for the birth of a national feeling. For at the core of that system was State 'Particularism', an obstinate force, which neither civil nor foreign war, nor yet persistent governmental debility, have yet cast out. Every frontier was an economic barrier, systems of coinage were different,<sup>5</sup> each state had its own variety of

<sup>1</sup> Cf. Bryce, *The Holy Roman Empire* (13th Ed., 1895), for the history of the political association of the German territories up to this time; and for an analysis of the situation at the beginning of the century, see Brandenburg, *Die Reichsgründung* (2nd Ed., 1922).

<sup>2</sup> Lessing, *Ernst und Falck*.

<sup>3</sup> For a good account of these thinkers in this particular respect see Meinecke, *Weltbürgertum und Nationalstaat*, Part I.

<sup>4</sup> Cf. Brandenburg, *op. cit.*, I, 55.

<sup>5</sup> Sombart, *Die deutsche Volkswirtschaft im neunzehnten Jahrhundert* (6th Ed., 1923), pp. 36-8; Clapham, *The Economic Development of France and Germany* (3rd Ed., 1928), Chap. IV; Treitschke, *History of Germany in the Nineteenth Century* (trans. by E. and C. Paul, 1918).

political absolutism. Particularism had grown out of the gradual assumption of power over a territory by prince or church, as the result of gifts, thefts, marriage portions, and conquests. It was not a popular emanation, nor entirely the product of race, nor of climate and different modes of livelihood. All these were parts of Particularism, but it was more. It was the deliberately established separatism of princes anxious for the security of their own acquisitions and the maintenance of the power of their dynasties.

The princes had won their way free of the Imperial majesty, owing to the accident that the Imperial authority was exercised by no one line for more than a century. Established in the states they reiterated that race, religion, interests, culture were different from and superior to those existent elsewhere. The good life was made to seem founded upon the political independence of the dynasty—which, alone, in those days, was the State.

**Nationality.** The French Revolution excited Germany,<sup>1</sup> and Napoleon swept away the Holy Roman Empire, reduced the independent principalities from 1,800 to thirty-three, and showed Germany how willing every dynasty was to accept his gifts of land at the expense of national independence and unity. A genuine *national* feeling was generated, not only among statesmen, poets and philosophers, but among the *people*. All classes were affected in blood and property, in the War of Emancipation, and all shared the common sufferings and final triumph.<sup>2</sup> Fichte's *Reden an die Deutsche Nation* expressed the spirit of the time.

Men and women in the different states were permeated by a wider consciousness of kind, which is the essence of Nationality. Vaguely, but effectively, their minds and feelings reached out to one another, to form the spiritual integument of a new fellowship. Old associations were revived with the inspiration of fresh meaning, language and learning and religion were felt to be bonds that ought to produce a more general community; the very past, full of intellectual and artistic creativeness and of brave and golden events in men's physical struggles, urged men to remember that they had been of beneficial, if unconscious and unintended, service to each other, and that, though they were now members of separate political groups, their separateness must not violate certain understandings of associated existence, that Germany as a whole represented a standard of political good

<sup>1</sup> Cf. Gooch, *Germany and the French Revolution* (1920).

<sup>2</sup> As Goethe said years afterwards (*Gespräche mit Eckermann*, March 14th, 1830), 'We have no town, we have not even a countryside of which we can say decidedly: This is Germany! Ask in Vienna and people will say, this is Austria; ask in Berlin and people will say, this is Prussia! Over sixteen years ago, when we finally wanted to get rid of the French, Germany was everywhere; a political poet could have been universally influential. But he was not necessary. The general need and general sentiment of shame seized the nation daemonically; the inspiring fire which a poet might have lighted, burned everywhere of its own self.'

to which statesmen and people of all states must expect, of themselves and each other, to pay the homage of subordination. Their inward and ultimate reasons for subordination did not matter : each must expect, and render to the other, the regard due to common citizenship.<sup>1</sup> But even when this spirit burned its fiercest the monarchs returned to their Particularism, lest any should obtain an advantage over the rest, and lest National feeling should destroy the pillars of their autocracy.

Nor were the unitary plans clear enough to unite a sufficient body of supporters. There was, as in the United States, substantial agreement about the powers it was desirable for a central authority to undertake :<sup>2</sup> but the question of conceding political authority to a unifying element was not so easily answered.

**Prussia and Austria.** Its analysis brought to light the second difficulty in German Federal development—the existence, side by side, of Prussia and Austria, jealous competitors and the feared and hated superiors of the small states. These large and long-standing rivals were immensely greater in size and resources than other states, and recognized each other as rival claimants for Germanic power. Could the German problem possibly be solved by a division of the territories into two—a South German Confederation with Austria at the head and the North German Confederation with Prussia at the head ? This was to court war between the federations. Could they work together ? Austria could not tolerate equality. Could there be a balance, even an association, between three systems : a *Trias* of Austria, Prussia and a federation of smaller states ? This was merely to increase the prospects of war, for the intermediate federation could not but be the diplomatic battleground of the two senior states. From the beginning there was only one solution possible ; the decisive exit of either Austria or Prussia from the field. For while both remained, the smaller states could, and did, play one off against the other, thus enjoying defence against their dreaded neighbours, without having to make the sacrifice of independence implied in a federal arrangement. When one great defender, Austria, broke down, the mutual fears of the small states and the general fear of Prussia caused cohesion around Prussia.

The advantages swayed more and more to the Prussian side. Prussia was almost entirely German in composition, Austria was less than half so ; her defensive plans were almost identical with those of the rest of Germany, that is, against Russia and France ; her religion was Protestant and tolerant, Austria's Catholic ; her absolutism was enlightened ; and though her local and individual liberties could not be compared with England's, yet they were more generous than Austria's. Further, and this became plainer as the century

<sup>1</sup> Cf. Fichte, *op. cit.*

<sup>2</sup> Cf. Lehmann, *Freiherr von Stein* (1903), III, *passim*.

advanced, Prussia was the dominant factor in the economic future of Germany, for she was planted where the lines of communication led to the great ports and river-mouths of the north coast, and she was able to buy loyalty by the offer of roads and railway stations. Austria lay south, entangled in racial and national difficulties, and was almost land-locked.

Yet there were serious psychological obstacles to Prussia's march to pre-eminence. She had arrived at power by military violence; poetic, philosophic and musical genius was freer and more warmly applauded in other states, the pettier dynasties and courts looked with jealous disfavour upon an *efficient* hegemony, and the religious difference between her and the Southern states was enormous.

The military unity of the war of liberation and the fears which persisted after its close had resulted in a queer kind of defensive confederation for 'the maintenance of the external and internal security of Germany and the independence and inviolability of the individual German states'. It was included in the Act of the Congress of Vienna. The Federal Act (*Bundesakte*) raised Prussia to equality with Austria (formally) though Austria had the chairmanship of the Assembly, and seemed to give all that was necessary for the time being: external defence and the possibility of settling interstate disputes by peaceful methods.<sup>1</sup> It is hardly worth speaking of it except to mention that the votes of the states were differentiated according to their importance, that either a two-thirds vote or unanimity was required for resolutions, and that the small, though larger votes of Austria and Prussia compelled them to become masters of intrigue in order to secure action. The Diet produced a sense of united government in Germany, and nourished the federal sense of liberals by their disgust with its actual reactionary character.

**1815-48.** Between 1815 and 1848, the lifetime of the Confederation, these lines of development are observable; the concentration of federalist aspirations upon Prussia, the evolution of political parties and national sentiment over State lines, the planning of constitutions for a federation, the growth of economic unity, the Revolution of 1848, and the end of the first open conflict between Prussia and Austria in which the latter was victorious. They all revealed by the credible demonstration of facts, more certainly than theories, the real nature of the difficulties.

There arose an expectation that Prussia ought to lead the federal movement. The summons, however, was conditional, and the condition is one which was inseparably attached to almost every similar

<sup>1</sup> Cf. Brandenburg, *op. cit.*, p. 73; Ebers, *Die Lehre von Staatenbund* (1910), p. 50 ff.; Sir A. W. Ward, *Germany* (3 vols., 1910-8), I; Brie, *Geschichte des Bundesstaats*; and compare the recent short account in *Handbuch des Deutschen Staatsrechts*, I (1930), by Ebers.

signal to Prussia, made then or since.<sup>1</sup> *It was, that Prussia in creating Germany, should dissolve in Germany.* But the Prussian Junkers were afraid of the social consequences to their class of inclusion in a larger body ; their interests required monarchical absolutism and the independence of their own provinces. Moreover, only a liberal régime would attract followers to Prussia from liberals all over Germany and weaken State dynasticism. Yet too liberal a system would cause those liberals to side with the dynasties out of fear of democracy.<sup>2</sup> The existence of a large state like Prussia—approaching two-thirds of the total area and population of Germany excluding Austria—must either draw all other states to it, or provoke their positive hostility. So narrow a channel had Prussia to navigate to become the instrument of union.<sup>3</sup> Every plan for the *peaceful* unification of Germany under Prussian leadership was caught in the toils of such difficulties.

The lack of popular interest is of central importance in the problem of German federalism. Federalism, a mere improvement upon a not intolerable system already in operation, is not likely to interest the multitude unless they either have had long experience of democracy and are regularly consulted by their governors, or unless they are under the influence of some great passion.<sup>4</sup> Neither of these requisites was present. The agitator of passions had not yet appeared, though his time was not far off.

The problem was thus left to students, liberal civil servants, governments, and a few convinced and enlightened politicians, and

<sup>1</sup> Meinecke, op. cit., pp. 333, 336. Cf. also Lehmann, op. cit., III.

<sup>2</sup> Even as at present the centripetal forces in Germany are nourished by the fear of Prussia's socialist bias.

<sup>3</sup> Paul Pfizer, the author of *Briefwechsel zweier Deutschen* (Stuttgart, 1831), said : ' Just because I consider that a powerful federal constitution is the ideal constitution which we must strive for given our native variety, I might well desire that in the interest of Germany the Prussian monarchy should have no *single general Parliament*, but in place of that, Freedom of the Press and provincial estates, which should be more than a mere artifice. . . . If the Prussian state remains divided into separate Provinces then the other German states can always be the counter-weights necessary to the maintenance of their freedom.' Another federalist, who later played a great part in the Revolution of 1848, was Friedrich von Gagern. His federal scheme was dominated by the thought of Prussia's actual predominance ; and therefore the federal state he envisaged, which was to be composed of the associated monarchies, presupposed three things. These were (1) that the states ought to be of somewhat equal size, since if they were not, the largest would easily acquire such an influence that the smaller associates would consider themselves oppressed and sacrificed to the interests of the larger, (2) that the hereditary monarch who should be the Federal Executive ought not to be the ruler of any one of the associated territories, and (3) that there should be no antagonism between the Federal and State parliaments. Cf. Meinecke, op. cit., p. 346 ; Ebers, op. cit. ; Brie, op. cit.

<sup>4</sup> Similarly with (1) local government reform generally, (2) regionalism in France and (3) the relief of parliamentary congestion in England. Even where long experience of democracy would seem to prepare people for necessary changes in these directions the preoccupation of their leaders with other more dramatically urgent things, pushes these to the background.

federal schemes thrown off between 1840 and 1848 were indeed many. The influence of political awakening and experience was just beginning (since the early 'thirties) to tell in the most important way: parties and learned societies whose conferences and programmes were concerned not only with the government of their own state but with the affairs of Germany, were being formed,<sup>1</sup> especially in the South and Middle German states.<sup>2</sup>

**The Economic Incentive.** An advance towards unity was made in the economic sphere, by the creation of a Zollverein, or Customs Union. The Prussian Tariff Law of 1818 began a system of economic consolidation and free trade which ultimately included all Germany, but not without the most spiteful obstruction by the Southern states and even the creation of a rival Zollverein by them in 1828.<sup>3</sup>

Prussia's superior road policy and her offer of a highway to the sea obtained by the Rhine Navigation Convention with Holland, forced the middle states and the Southern System to enter, in spite of the Catholic prejudices of the South, and Particularist fears. A *liberum veto* was accorded to each state at the assemblies.<sup>4</sup> The Union promoted the advantages now beginning to accrue from the development of railways, even as their development signalized, more clearly than before, the rationality of the arrangement. Up to 1848 the economic motive predominated. In fact, the Zollverein, being a Prussian invention, was now used by many Particularists as a bogey to prevent full federalism. But the liberals, to whom free trade was a fetish, were encouraged, especially in the revolution of 1848, in their hopes of full union by this economic precursor.

**From 1848 to Bismarck.** Political passion now stirred in two directions. Constitutional monarchy, at least, was demanded; and the old Federal Diet, weak and conservative, impelled liberals to seek an alternative. Then, within a few weeks after the French Revolution of February, 1848, all state governments, even the Prussian, were being directed by Liberal ministers. Federal plans were busily

<sup>1</sup> Reprinted in Salomon, *Die Deutsche Parteiprogramme*, I, 6. The South German liberal leaders, actuated by Malhy, the foremost politician in Baden, the centre of southern and south-western liberalism, set up a programme at Heppenheim in October, 1847. On the German question there was difference of opinion: some wanted a full federation with a Parliament at its head, others a slow development of the Customs union into an ever wider and more inclusive federation. The latter view prevailed (Salomon, *op. cit.*, pp. 3, 4).

<sup>2</sup> See on this the short but pregnant remarks of Bergsträsser, *Geschichte der politischen Parteien Deutschlands* (4th Ed., 1926), p. 17, and the bibliography given there.

<sup>3</sup> A policy was then formulated and worked out gradually by Maassen, Motz (Minister of Finance, 1825) and Eichhorn, Minister of Foreign Affairs and the diplomatic partner of the former in this policy. Cf. Doeberl, *Bayern und das Deutsche Reich*.

<sup>4</sup> Prussia might denounce the treaties in 1842.

canvassed. The Princes, panic-stricken by the radicals, listened to them. Austria refused to join; and Bavaria consented reluctantly only when the Revolution had become victorious.<sup>1</sup>

A constituent assembly, of 550, was elected on a very wide suffrage. Prussia had 141 delegates at this Assembly, Austria, partly owing to her difficulties with the Revolution in Vienna, only two.

Its success depended entirely on Prussian support. This would only be of value if Prussia were liberalized, if the King of Prussia was prepared to accept the leadership, and if Austria abstained. Prussia took the initiative, summoned the Diet (when Vienna succumbed to the Revolution), declared the need for a Federation.<sup>2</sup> But upon the slackening of the Revolution the various Germanic princes called a halt to the King of Prussia.<sup>3</sup> Revolutionary difficulties in Prussia put an end to her pretensions, for Frederick William IV simply dared not brave either Austria or democracy: the Junkers' desire for both political conservatism and Prussian separatism held him fast.

The Frankfurt Parliament lost itself in interminable discussions on the Fundamental Rights of Germans. It accepted a Federal Constitution, which excluded Austria, provided for a Popular Assembly, and a Chamber of States with graduated voting power, a large sphere of Federal authority. Two other things of exceptional interest:

In each large state the representatives were to be appointed, one-half by the governments, the rest by the popular assemblies. And Prussia? Again the motive to win Prussia for Germany, and Germany for Prussia: in any German state consisting of a number of

<sup>1</sup> Cf. Doeberl, *op. cit.*, and for this and the following events Brandenburg, *op. cit.*

<sup>2</sup> *Edict of March 18th, 1848*: (i) Freedom of settlement and of the Press. (ii) Unity of judicial administration and of measures and coinage. (iii) A common military system modelled on the Prussian, with a Federal flag and fleet. 'Since the end could only be compassed by agreement between princes and people, a preliminary representative body, elected from all classes within the limits of the Confederation, must be summoned at once; and the establishment of this, implied the existence of constitutions in all German states. The part to be played in the new Federal state by Prussia and her sovereign was left undefined; but a reference to the Prussian victories of 1813-14 was supplemented by a wish that at the head of the Federal army should be placed a Federal Commander-in-Chief. This was the form under which Frederick William IV consistently pictured to himself the ultimate hegemony of Prussia; the additional feature of a formally supreme Hapsburg Emperor was not introduced on the present occasion.'—Sir A. W. Ward, *op. cit.*, I, 437.

<sup>3</sup> The Prussian Proclamation 'To my people and the German nation' of the 22nd March courted the liberals and announced that the Prussian Diet offered an opportunity for the associated attempt of the various Princes and Diets to decide home and foreign affairs then demanding urgent attention. 'Prussia shall henceforth merge in Germany!' This at once called the hand of the Austrian and Germanic princes: Austria warned Prussia against any amendment of the Confederation without her co-operation: the princes refused co-operation, though some expressed readiness to be represented at the Frankfurt National Assembly.



Provinces or Counties with their own special constitution or administration, the representatives were to be chosen not by the Parliament, but by the Provincial Assemblies or Estates.

By a narrow majority (258 to 211) the Chief Executive was voted to be a German Sovereign. Who this should be, was not stated. But Prussia had the executive strength the Federation needed. Frederick William IV was offered the supreme executive, but he refused on account of the exclusion of Austria,<sup>1</sup> and the democratic source of the offer. Moreover, he desired unanimous invitation by the princes. Bavaria, Wurtemberg, Saxony, Hanover, ignored the movement and it collapsed.

What had it revealed? The *Gross-Deutsche* solution (which would include Austria) had been rejected by a small majority of federalists at Frankfurt against the Catholic South. Nevertheless, Austria did not accept this as a final judgement. Further, the South German States still wanted her guardianship, if from afar. Prussia had only two available methods of answering the call, each dangerous: to be liberal and risk domestic trouble and the vengeance of Austria and casual allies; or not to be liberal, and violently to expel Austria. There was a third way—to share power with Austria; but this Austria repelled.

**The Psychology of Association.** Yet a number of states lay side by side, and each was the centre of strong outward-running rays of aspiration and endeavour. Prussia had international interests and must reckon with France, Russia and Austria. Austria had international interests, and must reckon with Russia (for the Balkans), France (in regard to Italy) and Prussia. All the other Germanic states were reservoirs of men and money, and when combined, even as vague areas, were, as a friendly or a constitutionally associated unit, an asset in diplomatic relations. These, on the other hand, would have remained independent if they could: but, if bigger neighbours had designs upon them, then they must play one off against another, and attempt to obtain protection without loss of sovereignty. Yet all frontiers touch: and a touch upon sensitive frontiers injures, or appears to injure, the ganglia of spiritual and economic interests. The only alternative to warlike alarms is peaceful association. The federal association of Germany was impossible while Austria supported the South, and this prospect maintained the belief in all the middle and small German states, that if ever an alarm developed into a real threat they could find a refuge. Association was only possible where none were secure without it. Then they would create their own security, not by looking to Austria or Prussia, but by founding a Federal State. Either Austria or Prussia must be excluded if international diplomacy were to be changed into Federal

cohesion. Given her geographical position and purely German composition, Prussia could not be excluded. Then Austria must be excluded. Why? Because some association was unavoidable, and the most feasible was prevented by Austria's presence.

**Bismarck.** The decision and the deed were Bismarck's. The nature of this man decided the nature of the solution. Bismarck might have burnt up the old dynastic and Particularist conditions in a flame of a deliberately kindled democratic movement. This could not be, because Bismarck was, by nature and breeding, an autocrat. When his experience as the Prussian representative in the Federal Diet put him among the representatives of the lesser German states and in permanent opposition to the Austrian, his early narrow Junker ideal of Conservatism in Prussia and peace with Austria within the Federation, gave way to the fixed conviction of Prussia's title to hegemony in Germany and the expulsion of Austria.<sup>1</sup> He possessed qualities which at certain junctures are the making of states. He not only *knew* human nature : but he could, by an almost boundless energy, produce the combination of desired conditions by persuasion and command. From among all the constitutional plans he was clever enough to choose the feasible one, and this one he was able to realize. Further, his personal courage and ruthlessness for his cause were perfect. Nothing compared with his cause in value—no life, no wealth—not even Bismarck. Prussia and the Federation were his vocation : the *summum bonum*. Here was a man ready to sacrifice everybody and everything, because his own sacrifice had lost all significance compared with the compelling nature of his ultimate aim. He who is without doubts is without scruples.

**Bismarck's Policy.** What did Bismarck believe about German Federalism? He desired the greatness of Prussia. The Conservative idea of the State was that it should be strong, dominant, independent, and Bismarck shared this idea.<sup>2</sup> His congenital characteristics, his family history, the location of his estates, his friends, his caste (though he did not share in Romanticism), his Country and his King, pre-

<sup>1</sup> Count Prokesch-Osten, Austrian representative in the Diet, thus characterizes Bismarck's views of the Prussian German relationship : ' Herr von Bismarck declared that Prussia was the centre of the world. . . . He represented an endeavour to destroy the Federation. If an Angel had come down from Heaven, Bismarck would not have admitted this angel unless he had worn a Prussian cockade. . . . As clear-headed as Machiavelli, he was too shrewd and too smooth to despise any means that came to his hand, and we must admit that he was never a man for half-measures. . . . Thus did he indefatigably try to paralyse the Federation . . . and, making a lavish use of the Press, he knew how to imply that Austria was the guilty party. . . . So impressed was he with the importance of Prussia's mission, that he more than once declared to me that the unification of Germany under Prussia was indispensable. Never before have I met a man so secure in his convictions, so self-confident in his will.' Cited in Ludwig, *Bismarck* (trans. by E. and C. Paul, 1927), p. 152.

<sup>2</sup> Cf. Meinecke, op. cit., Chap. XII, *Ranke und Bismarck*.

scribed the channels of his energy.<sup>1</sup> Prussia had to play a part in international affairs, independent of Russia, France and Austria, all hereditary and potential foes. For international power Prussia needed united size. What rationality could be admitted to exist in this hotch-potch of states? Better for Prussia that there should be German unity: better for Germany that this should be so.

On what terms could unification be accomplished? The solution must be monarchical. The Princes must be kept; they were repositories of political power.

'In order that German patriotism should be active and effective, it needs as a rule to hang on the peg of a dynasty. Independent of dynasty, it rarely comes to a rising point, though, in theory, it daily does so in parliament, in the press, in public meeting. In practice the German needs either attachment to a dynasty or the goad of anger hurrying him into action: the latter phenomenon, however, by its own nature is not permanent. It is as a Prussian, a Hanoverian, a Wurtemberger, a Bavarian, or a Hessian, rather than as a German, that he is disposed to give unequivocal proof of patriotism. It is not difference of stock, but dynastic relations upon which in their origin the separatist elements repose. . . . The preponderance of dynastic attachment, and the use of a dynasty as the indispensable cement to hold together a definite portion of the nation calling itself by the name of the dynasty, is a specific peculiarity of the German Empire.'

Indeed, if Prussia assented to the downfall of a princely sovereignty outside Prussia, could there be any permanent security for herself against the same thing? Admit an indestructible sovereignty in the Princes, and Prussia was saved as well as they. Further, it was,

<sup>1</sup> Cf. a brilliant example of Bismarck's majestic courage and courtiership: 'After the "blood and iron" speech, William I, influenced by his family, was filled with the fear of rebellion and the execution of his minister and himself. "Then we shall be dead," said the King. "Yes," answered Bismarck, "then we shall be dead; but we must all die sooner or later, and can we perish more honourably? I, fighting for my King's cause, and your Majesty sealing with your own blood your rights as King by God's grace; whether on the scaffold or the battlefield, makes no difference to the glory of sacrificing life and limb for the rights assigned to you by His grace. Your Majesty must not think of Louis XVI; he lived and died in a condition of mental weakness, and does not present a heroic figure in history. Charles I, on the other hand, will always remain a noble historical character, for after drawing his sword for his rights and losing the battle, he did not hesitate to confirm his royal intent with his blood. Your Majesty is bound to fight, you cannot capitulate; you must, even at the risk of bodily danger, go forth to meet any attempt at coercion.''  
—*Reflections and Reminiscences* (Tauchnitz, ed. 1899), Vol. II, Chap. XII, pp. 75, 76.

<sup>2</sup> *Ibid.*, Vol. II, Chap. XIII. Note also the conclusion of this chapter: . . . 'Whatever may be the origin of this factitious union of Particularist elements, its result is that the individual German readily obeys the command of a dynasty to harry with fire and sword, and with his own hands to slaughter his German neighbours and kinsfolk as a result of quarrels unintelligible to himself. To examine whether this characteristic be capable of rational justification is not the problem of a German statesman, so long as it is strongly enough pronounced for him to reckon upon it. The difficulty of either abolishing or ignoring it, or making any advance in theory towards unity without regard to this practical limitation, has often proved fatal to the champion of unity; conspicuously so in the advantage taken of the favourable circumstances in the national movements of 1848-50. . . . The dynasties formed everywhere the points about which the German impulse towards segregation set its crystals in closer array.'

after all, not necessary at the commencement, at any rate, to secure more than that amount of associated energy and machinery which would make Germany a strong entity for the purposes of international diplomacy and the abolition of economic and judicial absurdities.

The dynamic elements were : Bismarck's convictions, the creation of a conquering army even by the destruction of constitutionalism, the belief that 'blood and iron' alone would settle the German problem, and the excitement of the country by its declaration,<sup>1</sup> the use of the Zollverein to persuade or browbeat any too-independent German states, the disarming of liberal opinion by the grant of universal franchise, the formulation of such constitutional plans as should exclude Austria, and, finally, the deliberate picking of a quarrel with that country in order that the test of arms might decide the German issue.

*The Nationalverein*,<sup>2</sup> the political party of liberal-unitarists under Bennigsen, though distrustful of Bismarck, owing to his anti-liberalism, declared its faith more in the Prussian constitutional proposals than the Austrian.<sup>3</sup> This, and the Austrian defeat over the Zollverein, were preliminary skirmishes before the inevitable battle. The Schleswig-Holstein problem was deliberately reopened, and inflamed : victorious concessions were made by Austria. The middle states were disillusioned by Austria's capitulation, the small states were full of fear at Bismarck's friendship with Napoleon ; for when had a Napoleon been respectful of the territory and sovereignty of the small German Princes ? Austria took fright that France would liberate her Italian possessions. Then Bismarck demanded a German Parliament elected by universal franchise ! This was genius in every sense of the word, even as far as the ultimate blindness of genius to the final, sometimes the suicidal, result of its own creative activities.<sup>4</sup> The immediate motives were : to generate a force in politics strong enough to overcome princely separatism ; to make that force one which should, perhaps, counteract liberal majorities by working-class

<sup>1</sup> 'It is true that we can hardly escape complications in Germany, though we do not seek them. Germany does not look to Prussia's liberalism, but to her power. The South German states would like to indulge in liberalism, and therefore no one will assign Prussia's rôle to them ! Prussia must collect her forces and hold them in reserve for a favourable moment, which has already come and gone several times. Since the treaties of Vienna, our frontiers have been ill-designed for a healthy body politic. The great questions of the time will be decided, not by speeches and resolutions of majorities (that was the mistake of 1848 and 1849), but by blood and iron.' —Cited in E. Ludwig, *op. cit.*, p. 220 ; cf. Bismarck's *Reflections and Reminiscences*, II, 74.

<sup>2</sup> Cf. Oncken, *Rudolf von Bennigsen* (2 vols., 1910), Bks. II and III.

<sup>3</sup> Brandenburg, *op. cit.*, II, 79.

<sup>4</sup> Bismarck's grant of universal suffrage was ultimately to result in the creation of such strong opposition parties in the Social Democrats and the Progressive Liberals and so to awaken political consciousness in Germany that his whole system fell into danger immediately he ceased to be Chancellor, and within a score of years completely broke down.

votes, which could be managed so as to benefit 'national' candidates of any class; to inflame Austrian opposition; and, finally, to throw a sop to the great mass of opponents of autocracy in the states, in Prussia and in future Germany.<sup>1</sup> The concession made easier Bismarck's way over Austria's body into the German Reichstag.

Finally, Bismarck proposed a widening of Federal authority to include all economic and foreign relations, and the command of the German armed forces. The unanimity rule in the Diet was to be set aside. To this Austria could not possibly assent, because an increase of power and the possibility of majority decisions would mean, often, if not always, a Prussian success.

Then a new plan excluded Austria and the Lower Rhine States altogether. Austria was bound to refuse to be pushed out of Germany. The Prussian plan was rejected. Thereupon Prussia declared that they considered the Confederation disrupted and annulled. The war of 1866 followed.

**The North German Confederation.** The most difficult part of the German federal problem was solved: Austria was excluded. There were still difficulties to overcome; even to-day many still exist. But only one magnetic pole of proven force now remained.

The North German States had found little security in time of war. Their Particularism had, in any case, been less stubborn than that of the Southern States. Out of their war-time association and treaties with Prussia emerged the North German Confederation of 1867,<sup>2</sup> the immediate precursor and model of the Empire of 1871.

The very core of Bismarck's constitution was this: the barest needs of unity, and no more, were satisfied, and a very large amount of independence was allowed, for Prussia's sake, as well as to coax the Southern States.<sup>3</sup> 'One must keep more to the Confederal system in form, but in practice give it the nature of a Federation with elastic, innocent, but far-reaching phrases.' To make a complete, exhaustive scheme would take too long, nor was it desirable: the old forms could be used, if with some difficulty. Since Bismarck now sought association and not annexation, he kept the old number of votes, adding thereto only the votes of the annexed countries. This gave Prussia seventeen votes out of forty-three, and it could only be in a majority if it controlled five more votes. As a constitutional amendment, however, could be defeated by fourteen votes, a veto was given to the small states if solid, and to Prussia always. Military resolutions

<sup>1</sup> Brandenburg, op. cit., II; Angst, *Bismarck's Stellung zur deutschen Wahlrecht*; Bismarck, *Reflections and Reminiscences*, II, 245-9.

<sup>2</sup> Cf. Treaty, 18 August 1866: Triepel, *Quellensammlung*, p. 200.

<sup>3</sup> Brandenburg, op. cit., II, 218; E. Kaufman, *Bismarck's Erbe in der Reichsverfassung*, Berlin, 1917. On Bavaria and the renewal of the Union see H. von Sybel, *Die Begründung des deutschen Reiches durch Wilhelm I* (7 vols., 1901-8), III.

required the assent of the Federal Commander-in-Chief—the Prussian King. Other main points were the sovereignty of the Federal Council, not of the popularly elected Reichstag, and the responsibility of the Federal Chancellor to the Federal chief alone, not to the parliamentary bodies ; and the execution of Federal laws by the states.

No state opposed this Constitution, and it came into force in July, 1867.

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Bismarck had virtually made the German Empire. A feasible association has been created, giving unity in more things than had been hitherto possible in the Germanic States, and more things than, in the heat of the moment, Bismarck had thought immediately desirable. Fear has overcome the objections of princely separatists, and victory that of Prussian dissentients. Now the economic and spiritual advantages of federalism issue in laws and they tend to heal old wounds and regrets and make retrogression impossible. Free migration, common regulation of poor-law settlement, freedom of industry from gild restrictions, freedom of association, factory legislation, the abolition of usury laws, were great economic and social boons, and swept away many antiquated institutions. A single bill of exchange law and commercial code, and laws relating to patents and joint-stock companies, the reform of consular representation, further regulated the industrial and commercial energy of the day. The federation was also knit together by the social influence of a uniform criminal code.<sup>1</sup>

The Federation is as yet, however, only a fragment : the Southern States are not yet included.

**The South and the Customs Parliament.** The first impulse of the Southern States, Bavaria, Wurtemberg and Baden, was to make federal terms with the North German Confederation, for Austria had failed them, and France was impertinent. But Particularistic motives revived ; the dynasties were still popular, and anti-Prussian feeling was strong. The old fear of Prussian harshness and discipline as seen in the Civil Service, and the Army, and Bismarck's roughness with Parliament, combined with the steady pressure of the Catholic Church<sup>2</sup> to keep them away from Prussia. Nothing more than a defensive alliance with these states could at the moment be achieved.<sup>3</sup> For all Germany then there was a federation for *defence* purposes,

<sup>1</sup> For an account of the North German Parliament's activities see Robolsky, *Der deutsche Reichstag* (1893).

<sup>2</sup> Cf. Bachem, *Vorgeschichte, Geschichte und Politik der Deutschen Zentrumsparthei* (1927), Vol. II, Chap. VII. The Bavarian Catholic Party was Particularist ; the feelings of the Catholic majority in Bavaria were wounded by the assumption of some Prussians that the war of 1866 had been a religious war by which 'the work of the Reformation had been completed' (p. 231).

<sup>3</sup> This secret treaty was signed in August, 1866, and published in 1867.

but the Southern States insisted on their independent judgement of a *casus foederis*.

The *Zollverein* had been disrupted by the War. Bismarck resolved to make it a preparatory school for unity. Almost simultaneously with the advent of the North German Confederation Bismarck propounded, and all the states accepted, a new scheme for the Union. Its two main features, vital as a sign of the conquest of Particularism and of the future order, were : (1) a Bicameral system consisting of *Zollbundesrat* (Customs Federal Council) and *Zollparlament* (Customs Parliament) which permitted a popularly elected element, and (2) the rule that *decisions could be taken by majority vote*. The latter feature betokened this great admission, that for the good of the whole territory, the minority must submit. Representation in the Customs Federal Council was based upon the number of votes already accepted in the *Bundesrat*, and then Bavaria obtained 6, Wurtemberg 4, Baden 3, and Hesse 2. The Customs Parliament was based on *universal suffrage*, and, in practice, the members of the North German Parliament were also members of this Parliament, the elected members from the new states being added. Already a long step towards the end had been taken, for there was now a common rule over customs and taxes, trade and communications.<sup>1</sup>

It is impossible, in the long run, to discuss economic affairs alone, nor can the representatives of the states, when democratically elected, be always a unanimous phalanx representative of Particularist interests. The free trade and tariff arrangements had visibly favourable effects upon commerce. The ceremonial and the amenities of a common life in the same Assembly had the effect of smoothing down the sharpest antagonisms.<sup>2</sup> National political parties arose to extend

<sup>1</sup> Cf. Ward, *op. cit.*, II, 369, on the creation of committees to deal with customs and taxes, trade and communications, and accounts.

<sup>2</sup> Robolsky, *op. cit.*, pp. 84, 85, King William I, at the closing of the Session : 'Gentlemen, you all earnestly desire to further this development, and if, so far, no arrangement about the method by which these two equally justified interests are to be reconciled, has been reached, yet I trust that at your next meeting, by the combined efforts of the united Governments and of the Customs Parliament, a successful result will be attained. I hope, quite as much, that the session of the German Customs Parliament, which I closed to-day, has served to strengthen the mutual confidence of the German peoples and their Governments; that it has served to destroy or at least to diminish several prejudices, which somewhat prevented a concerted manifestation of love of the common Fatherland, love which is the inheritance of all the German races alike. You will all return home convinced that, in the whole German people, a fraternal feeling of homogeneity exists—a feeling, independent of its mode of expression, which will progressively gain strength if we all endeavour to put in the foreground that which unites us and relegate to the background that which divides us.' The sessions were followed by a splendid banquet, given by the Berlin merchants, in the new Stock Exchange building. On this occasion, Count Bismarck addressed the South Germans as follows : 'Our brief meeting has passed quickly like a spring day; may its effects be similar to that of spring on the future period. I believe that, after your joint work for the German good, you will return home convinced that you will find here brotherly hearts and hands for all of life's circumstances, and that every fresh meeting will and must strengthen this relationship.' These words were received with stormy

the power of the Union and election campaigns were fought on the issue. On the other hand, the whole armoury of political tactics was now used to obstruct the road to unity now being trod by the great party of the National Liberals.<sup>1</sup>

Bismarck was not impatient : the result was inevitable. All must be done to attract the South German States, their peculiarities must not be mocked but genially suffered, and even given institutional room and effectiveness.<sup>2</sup> Yet the Federal movement slowed down, for Bismarck too well incarnated the Prussian spirit. The Southern States attempted to establish a separate Federation, but their plans failed, for among equals there is neither fear, nor gratitude, nor reward which can overcome jealousy and sovereignty.

**War and National Feeling.** Some excitement, an upheaval, a scene, was necessary to give back creative control to Bismarck. Would a common war help? Yes; against a foe who aroused defensive reactions and memories of historic battles and common aspirations. It was evident that if the opportunity for war with France should arrive it would be taken to make sure that Germany's unity, however produced, should not be subject to France's veto. Any quarrel would have to be braved out; for diplomatic defeat was federal retrogression, while military victory was almost certain federal progress. In 1868 Bismarck says: 'A more extensive union of the majority of Germans could only be obtained by force—or *else if common danger should rouse them to fury.*'<sup>3</sup> The occasion came.

applause on all sides. The Bavarian Minister-President, Prince Hohenlohe, replied to the Chancellor's farewell speech: 'The enthusiasm, aroused in the hearts of the South Germans, by the Chancellor's words, may prove to you that a *rapprochement* between the South and the North has taken place—a *rapprochement* which has not been lessened but increased by the work of the Customs Parliament. . . .'

<sup>1</sup> For this phrase cf. Robolsky, op. cit.

<sup>2</sup> 'Besides is unitarism the most useful and the best form? Is it so for Germany particularly? Is it historically founded in Germany? That it is not, is shown by the Particularist institutions which develop in all aspects of life in Germany. It has led to the German feeling completely comfortable only in a small area, and to the conviction that one is not doing well to deprive him of his domestic comfort any more than is necessary to keep the whole together and give its effectiveness as against outside countries. This Particularism is the basis of the weakness, but, from another standpoint, that of the strength of Germany. The small centres have spread a common possession of culture and well-being through all parts of Germany, in a way rarely found in unitarily organized lands. You must have visited these, civilized and uncivilized, to appreciate how, there, the provinces remain behind the capital. The defects of Particularism, weakness abroad, heterogeneity at home, obstacles to development of commerce and transport, the Federation has completely combated, and completely to abolish them is its further duty. Give it enough time! . . . centralization is more or less a matter of force and is not to be carried through without a violent operation, sinful in the sense of the constitution, and such action, whether formally covered or justified, leaves places which bleed internally and no man knows for how long this may go on. I believe that one should ask oneself, in the Germanic states, what can be regulated in common? and that which need not be regulated in common should be left to local development. Thereby one serves freedom, and one serves welfare. . . .' (Robolsky, loc. cit.)

<sup>3</sup> E. Ludwig, op. cit., p. 319.



In a few months the Second Empire had fallen. The Southern States had hardly hesitated to fall in line with North Germany—though in Bavaria the Ultramontanes were able for some time to stop intervention.<sup>1</sup> All troops had come under the Prussian supreme command. The war was felt to be a German war, and victory supported Unity.<sup>2</sup>

Bismarck had no desire to overpower the South, but the opportunity would perhaps never recur, and pressure was needed. After Sedan, Bismarck let his press loose. Elsewhere Particularism had weakened, but in Bavaria the Ultramontanes and the peasantry were at odds with the nationally minded people of the large towns and the population of the Palatinate and the Protestant districts. King, Court and Liberal opponents of Prussia were still separatist. Bismarck's attitude was that the burden of proof was on those hostile to Federalism. Germany was one, had been one in a great war, was naturally one. Yet this must be demonstrated. All diplomatic channels were opened and used: Alsace should become an *Imperial* territory! the *Zollparlament* was convened—a forum of discussion just when the whole country was excited and eager for sensational events and policies. When, after Sedan, both Baden and Würtemberg positively begged inclusion in the Federation, Bavaria's hand was forced: it would be shameful to be the last state in!

Protracted, subterranean and often angry negotiations between Bavaria and Würtemberg, between these, separately, and Bismarck, and between Bismarck and Baden, ensued, each state watching that the others should get no more favoured position than it received. The North German Confederation was accepted as the kernel of a new federation, but special concessions were demanded. Bavaria's principal demands were: complete independence of its railway system, posts and telegraphs, taxation of beer and brandy, legislation in matters of settlement and citizenship, conditions of carrying on a trade, the whole of the civil and criminal code (with the exception of the law relating to commerce and credit instruments), and consulates; an increase of its votes in the Bundesrat to eight, (it had six in the Customs Bundesrat), a Bavarian representative in the Bundesrat Committees for Army and Fortifications, Tariffs and Taxes, Commerce and Transport, independence of the Bavarian Army while carrying out a reorganization uniform with that of other states, and subordination to the Federal Commander-in-Chief only in time of war. Further, to the Navy, which Bavaria considered to be of importance only to North Germany, she would make no contribution. All these

<sup>1</sup> Bachem, *op. cit.*, II, 242, 243.

<sup>2</sup> In his *Vom Wesen der Menschlichen Verbände*, Gierke confesses what an overpowering sentiment of identity with the nation he felt as the victorious troops came marching along Unter den Linden.

exceptions inevitably led to the further demand for a separate budget. In foreign affairs, independence was to be guaranteed by separate ambassadors ; the Bundesrat must assent to a declaration of war, and in peace negotiations Bavarian representatives should be present. Finally—and this was the most energetic claim to independence—Bavaria must have an absolute veto on any extension of Federal power and against all constitutional amendments affecting its number of votes or its privileges, and it must have the presidency of the Bundesrat in the absence of Prussia. The more Bavaria wished, the more the other states demanded.

Bismarck, the Prussian fanatic, could realize what it meant for a state with a long independent history and a deeply founded individuality, to surrender its sovereignty. Prussia had done this only because it was in a position to obtain much and give so little. The principle of graduated privileges was just, and must be accepted. However, this graduation must be accomplished discreetly ; neither must know what the other was asking or being offered. Negotiations, therefore, were conducted separately and privately. A tremendous amount of chicanery was practised ; and even theft of territory was arranged by secret agreements with Bismarck !

Finally, Bavaria succumbed to the possibility of being the only state outside the union, the risk of individual war with France, and denunciation of the Zollverein, which, in her peculiar geographical position, would have been a disaster felt every day and by every class. One by one her pretensions were surrendered : but she received considerable concessions, the nature of which we describe in the analytical chapter. Most bitter loss of all was the loss of military freedom and submission to Federal inspection of the army, the Federal oath, and Federal determination of total military expenditure.

Had Bismarck used all his available force, the Empire might have been closer-knit ; but the powers of Europe were watchful and jealous. Nor did he desire anything much more unitary : for he was jealous for Prussian independence. Then, the King of Prussia swearing never to be ' Emperor of Germany ' became ' German Emperor '.<sup>1</sup>

The Constitution was accepted with little opposition in Baden, Hesse, and Württemberg. In Bavaria the Constitution was accepted in a few days by the Lower Chamber, by all except three votes. In the Upper Chamber the Ultramontane majority reported adversely.<sup>2</sup> Since there was no midway between acceptance or rejection and the consequences of rejection were frightening, the Constitution was

<sup>1</sup> Bismarck had let go the title ' Kaiser von Deutschland ' on being convinced that the other princes might take this title to be a claim to sovereignty in their states, and Parliament had used the alternative title ' Deutscher Kaiser '. William I made this into an issue with Bismarck, out of temper at Bismarck's growing power rather than out of any rational discrimination between the one title and the other.

<sup>2</sup> Cf. Bachem, *op. cit.*, II, 244, 245.

accepted by 102 against forty-six, some Ultramontanes absenting themselves.

All things produce their proper symbols, but none was ever so appropriate as a coronation in a vanquished land to inaugurate this federation, reared to virility by the Prussian Mars, for only arms could expel Austria, and exorcize that enemy of monarchical federation, democracy. Since the people could not win their way to political authority, and to a federation based upon acknowledged utilities, fear and slaughter, ruthlessness, cruelty and cunning were licensed. For the despotic prince of a sovereign state has all to lose, while the individual voter may believe that he personally loses hardly anything, when he consents to give up a fraction of his morsel of sovereignty. The prince must be made to fear the consequences of his refusal. But every force in politics demands its price and is, in some way, paid for. The German Empire paid for its federal advantages by the burden of Prussian hegemony. It was not until the originally needful operation had been performed, the transformation of the monarchy into a democracy, by a violent assertion of popular rights in November, 1918, that the Empire at last arrived at a less strained, a more peaceful and more unitary federation.

\* \* \* \* \*

This does not conclude the development of German federalism, but it would spoil the exposition if the account of German federalism were at this point pressed beyond 1871. The changes of 1918 and 1919, which have given the system a new spirit as well as new institutions, will better follow when the results of 1871 have been analysed.

\* \* \* \* \*

Thus, in the formation of Federations the impulses have been given by spiritual ideals of national unity, by the prospect of the fullest extension of certain desired rights, by the economic motive, by considerations of defence, international prestige, the peaceful settlement of fears produced by the contiguity of human groups which tend to form collective dislikes, the amicable resolution of common problems, and by the energies and aspirations of specific men. On the other hand racial, cultural, religious and economic differences obstruct the formation of the great state, while personal desires for prestige, which can be satisfied only in a small and separate polity, add to the separative force.

\* \* \* \* \*

It is now necessary to consider how these various motives, having made terms with each other, issue in federal institutions. These institutions have an interest for us, as the result, in terms of machinery and functions, of the federal movement, and, secondly, for the interesting problem they present: did they work as they were

intended, and if not, what caused the deviation from their planned course ?

\* \* \* \* \*

Before we turn to an analytical account of Federal institutions and ideas let us compare, and have before us, the bare facts of their territorial extent.

	Area. Sq. miles.	Popula- tion, Millions.	Span of Latitude.	Span of Longitude.
<i>Federation.</i>				
U.S.A. . . . .	2,973,774	120	25°-49° N.	67°-124°30' W.
Germany . . . .	182,200	62.5	47°-55° N.	6°-23° E.
Australia . . . .	2,974,581	6.0	10°41'-39°8' S.	113°9'-153°39' E.
Switzerland . . .	15,940	3.9	45°50'-47°48' N.	5°58'-10°30' E.
Canada . . . . .	3,684,723	9.7	142°-54° W.	41°-72° N.
<i>Unitary.</i>				
Gt. Britain (exclud- ing N. Ireland) .	88,432	44.2	50°-61° N.	7°8' W.-1°9' E.
France . . . . .	212,659	39.8	42°20'-51°5' N.	7°45' E.-4°45' W.

There is a tremendous disparity in the size, density of population, and climatic and economic range. The U.S.A., for example, contains over thirteen times as many people as Switzerland, and has an area about 180 times as large. The climatic and economic range of America, Canada and Australia is enormously greater than that of Germany. Hence a wider effective and compelling diversity. Broadly we can say that, other things being equal, sheer size makes any governmental system difficult ; the larger the area, the more diverse the interests, the greater the extent of decentralization ; the sparser the population, the greater the decentralization ; the smaller the area, the greater the contiguity and the less the diversity of interests, the greater the centralization ; the denser the population, evenly over large areas of the federation, the greater the centralization. Athwart these facts lie differences of religion, secular culture, and race ; and, also, accidents of history ; these give extra and differentiating turns to the pattern. One should beware, for example, of parading Swiss federal institutions as an example for India, or those of the United States of America as a model for a decentralized Great Britain.

## CHAPTER IX

### FEDERALISM: INSTITUTIONS AND IDEAS

**A** FEDERATION reveals these qualities different from those of extreme unitary states :

- (a) The distribution of legislative powers.
  - (b) The distribution of administrative powers.
  - (c) Representation of the States in the Federal parliament.
  - (d) Special Revenue arrangements.
  - (e) Special Judicial arrangements.
  - (f) Stipulations relating to the form of state government.
  - (g) Specially difficult amending processes.
  - (h) A special application of the theory of allegiance and secession.
- And we shall therefore discuss these in terms, comparatively.

#### THE DISTRIBUTION OF LEGISLATIVE POWERS

This depends upon two considerations: the actual utility of large-scale organization, and the relative power of the spiritual jealousies for local or central government. People are ready to forgo proven material utilities for spiritual satisfactions, and up to a point, which varies from country to country and time to time, refuse to be tempted by the economies possible from the technique of the age. In the U.S.A. the spiritual jealousy in 1787 was great, and was overcome only by the prospects of disaster evident to the commercial and professional classes. But the victory was won by a narrow margin and the expression of the strength of separatism showed itself in two ways: the Federal authority received only the powers *enumerated*, together with a general power to do what was 'necessary' to make these powers valid; and all other powers were *reserved* to the states, the residual as well as the original sovereignty being, at the commencement of the Federation at least, deemed to lie with these states. The powers of the Federation extended to<sup>1</sup>: the raising of revenue; borrowing money; regulating commerce with foreign nations and among the states; naturalization and bankruptcy; coinage and weights and measures; the posts; copyright and patents; *inferior* courts of justice; piracies and felonies at sea, and offences against the law of nations; the declaration of war; the raising and mainten-

<sup>1</sup> Constitution, Art. 1, Sect. 8.

ance of armed forces, the establishment of a militia which could be used to execute the laws of the Union, suppress insurrections and repel invasions, and to make all laws 'which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or offices thereof'.

With certain limitations, all the other possible objects of legislation remained with the states. But in an age of *laissez-faire* and before the invention of modern industrial technique and transport this must have seemed little to leave to the states and much to give to the Federation. This distribution of powers left a vast potentiality to the states: their constitutional problems could be solved as they desired, save for the stipulation of the republican form of government, and for certain conditions regarding the suffrage; they retained the power to raise revenue, though this could not be done by way of duties on foreign and interstate commerce or federal functions; the whole of the police power remained with them; then there were powers over education, religion, associations, and private-law powers like those affecting marriage, divorce, and so on. The sources of legislative competence had been tapped for the benefit of the Federation; but a gushing well remained in the states.

Further, in accordance with American political and constitutional teaching, certain powers were definitely prohibited to both the states and the Federation.

From the list of powers given we have omitted the conduct of foreign relations of the U.S.A. This is vested in the Federation, and according to the system of separation of powers it is exercised not by the Congress, though the Senate must ratify treaties, but by the President.

Since the establishment of the Federation the powers of the Federal authority have been considerably augmented, and this in spite of the fact that the Virginia resolutions of 1790 which formed the basis of the first ten amendments were intended to set the limit to its powers.<sup>1</sup> The increase of the competence of the central authority has occurred by three processes: by statutes, by amendment of the constitution, and by its judicial interpretation. The amendments did not come easily, there were none, indeed, until the latent problem had been solved, whether the Federation's will or that of the separate

<sup>1</sup> One of those resolutions actually ran: 'First. That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this constitution delegated to the congress of the United States or to the departments of the Federal Government.' But this recommendation took a final form in the constitution (amendment X) which reflected this entrenchment of State rights, and left the Federal authority an extensible field of power: 'The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the ;

states was politically paramount. For when the constitution was first established there existed no general agreement upon the import of the new arrangement. Men did not realize what they had done. Although the constitution begins with a preamble which seems to decide the paramountcy of federal good over state rights, such a doctrine was long challenged.

Yet a point was finally reached where the indirect moulding of the constitution by judicial interpretation vitally affected the economic welfare of the Southern states and the moral sentiments of the North. Congress was declared to have no power to control slavery in the territories.<sup>1</sup> Only a constitutional amendment could give this power; and the Southern states were too strong for this to be possible. The South seceded, the Civil War began, the South denied the paramountcy of 'the people', the North asserted it. Three years after the close of that war Chief Justice Chase summarized its political results<sup>2</sup>: 'The Constitution in all its provisions looks to an indestructible Union, composed of indestructible states.' The idea of Union had triumphed over the idea of state rights, and states may be destroyed in more ways than one. The nation and the national good became emphatically a dominant part of the national psychology, while the amendments added to Federal power.

This coincided with the full onset of industrial and commercial civilization based upon steam-power and rapid communications. The activities of companies gave rise to the need for legislation, at first state, but owing to their necessarily ramifying tendencies, more and more decidedly Federal. The commerce, the postal, and the taxing powers, were given far-reaching interpretations, and within its admitted scope Congress filled in the details of law and administration. To these powers have been added those imposed by the strong moral feelings of large bodies of Americans, especially the middle-class: woman suffrage and the prohibition of intoxicating liquors. The first was the result of the pure coercive determination to take away from the 'backward' states their freedom to be backward, and the second because 'dry' states could be contaminated by the 'wet'. And, generally, powers have gone to the Federation where the separate states have shown sloth, financial inability, or ignorance, and have not reached the standard approved by Federal society (as in the case of subsidies<sup>3</sup> to states for agricultural education) or where only a large-scale organization could cope with technical difficulties, as in excluding pornographic matter from the mails.

Complaints are now made about 'Federal Usurpation', and the

<sup>1</sup> *Scott v. Sandford*, 19 How, 393 (1857).

<sup>2</sup> In *Texas v. White*, 7 Wallace, 700, 724-6.

<sup>3</sup> See Macdonald, *Federal Aid*, New York, 1928. American states seem to have been just as ready to sell self-government for central subsidies as local government authorities are in England and Europe.

dwindling power of the states. But in fact the states still exercise a vast amount of power. A simultaneous increase of powers for both state and Federation has occurred; and, at the same time, a shifting of legislative competence from the former to the latter. The normal increase in the need for legislation everywhere must be remembered in judging cries like those of 'Federal usurpation'; the question is rather one between government and the individual than between states and Federation.<sup>1</sup>

In Australia a somewhat similar tendency is observable. Here there was no specially pressing reasons for federalism, it was desirable rather than necessary. Nor was the centralizing experience of the U.S.A. without its effect upon the constitution-makers. Consequently the powers of the Commonwealth were to be only those expressly enumerated; the others being reserved to the states (Section 107).<sup>2</sup>

The centralizing trend is nevertheless continued in Australia<sup>3</sup> and Switzerland<sup>4</sup> also.

**Germany.** In Germany the distribution of powers is a quite remarkable reflection of the development of unity. Step by step the

<sup>1</sup> Cf. Cushman, *National Police Power under the Commerce Clause of the Constitution*, *Minnesota Law Review*, III (1919); West, *Federal Power: Its Growth and Necessity*, New York, 1918; Pierce, *Federal Usurpation*, New York, 1908; and best of all—Thompson, *Federal Centralization*, New York, 1923. The last work is very good historically, but the analysis of cause and effect is not so good.

<sup>2</sup> Cf. *Report of the Royal Commission on the Constitution* (1929), Sect. VIII, p. 76: 'In comparing the Commonwealth Constitution with the American Constitution it is important to bear in mind not only the list of subjects assigned to the central legislature (cf. Sects. 51 and 52 of the Commonwealth Constitution, and Article I, Sects. 1 and 8 of the Constitution of the United States) but also the express prohibitions which are contained in the American Constitution but have no counterpart in Australia. . . .

<sup>3</sup> Cf. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, etc., 1901, pp. 646 ff., on the history of the adoption of 'Conciliation and Arbitration'.

The *Report of the Royal Commission on the Constitution* (1929) is not unanimous on this point. The Majority Report rejects the scheme that the Commonwealth Parliament should be 'empowered to legislate with respect to industrial matters generally', because industrial legislation should be regarded as 'a function of the States' (experimental nature, used for local supervision, etc.). The conclusion is then reached: 'In our opinion paragraph XXXV of section 51 of the Constitution, which relates to conciliation and arbitration, should be deleted. We think that the Parliament which deals with industrial arbitration and conciliation should be the Parliament which has control of industrial matters generally. . . . The Minority Report stresses the evils of competition arising from different rates of pay and conditions of employment in different states. 'One of the benefits of a Central Government is that it can remove dangers of this character' (pp. 244, 245).

<sup>4</sup> In Australia, in the absence of these prohibitions the question in regard to similar (social) legislation is whether it comes within the sphere of the Commonwealth Parliament, and not whether it is beyond the competence of both legislatures.'

<sup>5</sup> Cf. Gariel, *La Centralisation Économique en Suisse*, 1913. In Switzerland, too, controversy has been confined to the delimitations of Federal and Cantonal legislative powers. For an interesting comparison between the Swiss and the United States Constitution see R. C. Brooks, *Government and Politics of Switzerland*, London, 1920, pp. 48-70.



powers given to the projected Federations were increased, reaching their highest point in 1848.<sup>1</sup>

Bismarck was not anxious for too much federal power. In the North German Confederation the Confederate authority received <sup>2</sup> legislative power over free and equal mobility, citizen and settlement rights; tariffs and commerce; weights, measures, coinage, paper currency, banking, patents, copyright, foreign commerce, railways, roads and canals (put in by the Reichstag); navigation on rivers common to several states, posts and telegraphs, mutual execution in matters of civil law, accrediting of public documents, contracts, crimes, commerce and bills of exchange and legal procedure (put in by the Reichstag), military and naval affairs (put in by the Reichstag) and public health and veterinary administration (put in by the Reichstag). In 1871 a further increase of power occurred, though exceptions had to be made to satisfy the Southern states. Its principal alterations to the powers of the German Empire were, one addition, power over the Press and the Right of Association, and the exceptions to Federal power in the matter of Bavarian railways <sup>3</sup> (over which the Reich had power only as far as military plans made it necessary), and in the matter of the Bavarian and Würtemberg posts and telegraphs <sup>4</sup> (where the Reich had power only over charges). Of course, in the North German Confederation and the Federation of 1871 the armed forces,<sup>5</sup> diplomatic representation, the power of war and peace were vested in the Federation. And in both it was understood that the Federal authority was one of enumerated powers, the residual sovereignty lying with the states.<sup>6</sup> That sovereignty extended over an important field, agriculture, industrial law, mines, education, church and state—all these were untouched by the Federal constitution, and remained the exclusive possession of the states. Further, until the Federal authority comprehensively legislated on such things as the right of association, sanitary administration, and so on, the states were concurrently competent.

In Germany, alone, were *the states treated unequally* and the Federation given powers not homogeneous for its whole territory; and the

<sup>1</sup> Lehmann, *Stein*, Vol. III, 311 ff., 346 ff.; Bergsträsser, *Geschichte der Reichsverfassung*, Tübingen, 1914, p. 4; *ibid.*, p. 25; Constitution, 1849, Sect. II.

<sup>2</sup> Constitution, 1867, Sect. II, Arts. 2-5.

<sup>3</sup> *Ibid.*, Art. 46.

<sup>4</sup> *Ibid.*, Art. 52.

<sup>5</sup> *Ibid.*, Arts. 57 ff. Under this Constitution the States contributed contingents whose numbers were determined by Federal Statute. The Commanders-in-Chief were appointed by the Kaiser and swore allegiance to him. But Bavaria, Saxony and Würtemberg enjoyed large privileges. Cf. Laband, *Staatsrecht*, IV, 14; Triepel, *op. cit.*, p. 187 ff., for the effect of the conventions based on Constitution. In the U.S.A. only the Federal authority has an army and full and undivided control over it; the States may maintain militias for police purposes (Second Amendment), but they may not help troops or engage in war save against actual invasion or imminent danger.

<sup>6</sup> Yet this was by no means undisputed. See p. 289 ff., *infra*.

difference lies in the general nature of the Federal compact: concessions were forced by Bavaria and Württemberg in the name of their immemorial sovereignty. In 1919 a fundamental transformation of the distribution of powers occurred, but, according to our plan, this is described later, after an account of the Revolution of 1918.

**Developing Centralization.** The distribution of powers of 1871 underwent changes: between 1871 and 1914 there was a constant process of centralization, and the vital necessities of the war of 1914-18 produced a tremendously powerful unifying tendency.<sup>1</sup>

**1914-18.** Prompt decisions and uniform plans, even uniform execution, were needed. Germany was cut off militarily and economically, and had to make the best of its internal resources. With small choice, because supplies were lacking, and ever imminent danger, particularism, which always costs something, became a prodigal luxury, and centralization a necessity.<sup>2</sup>

<sup>1</sup> There was a gradual erosion of the reserved rights of the South, and there were important financial changes, to be discussed in their proper place. Bavaria relinquished its rights to a supreme military court. Württemberg introduced Imperial Stamps. In 1873 the clause giving the Reich power over Commercial Contracts, and Bill of Exchange Law, Criminal Law, and Legal Procedure was amended by the substitution of 'the whole of civil law' for the first set of subjects. More and more use was made of its exclusive powers, so that the original elasticity of the State was more and more compressed, and the use of some of the undoubted powers of the Federation caused an implied interference with powers not under its jurisdiction. Further, the laws made by the Reich under Article 3, on Sojourn, Residence, and Settlement, Occupation, Judicial Procedure and Conflict of Jurisdiction, were all unifying laws, for they did not merely produce a not less eligible situation, but positive institutions and behaviour in all states. Finally, concordats were made between the States, as, for example, those regarding railway fares, education, cholera, quarantine of foreign ships, roads and motor transport, legal phraseology to be used in official proceedings, patent medicines, and lotteries.\* This development is traced in Laband, *Geschichtliche Entwicklung*, and the brilliant study by Triepel, *Unitarismus und Föderalismus im Deutschen Reiche*, Tübingen, 1917. Cf. Poschinger, *Bismarck und der Bundesrat*, *passim*.

<sup>2</sup> By the war-power of the Federation the railways, the posts, telegraphs, roads, were unified; the army was welded into a single instrument; all arrangements for the production and distribution of food were centrally planned; a German equivalent of the British Defence of the Realm Act, the *Ermächtigungsgesetz* of August, 1914, gave rise to a multitude of Statutory Rules and Orders sufficiently harnessing every function of property and labour to the task of winning the war. What were the results of this change in the distribution of powers? 'The experience of the war taught that German political and economic life had become much more uniform than appeared from the division of administrative authority between the States and the Reich. The more unified administration which issued from the war showed at the same time that it was practically possible to abolish the differences in organization which were founded in the hitherto existing federal structure of Germany. Finally, the War led to a close co-operation between the bureaucracies of the States and with the central departments of the Reich.' Lassar, *Reichseigene Verwaltung unter der Weimarer Verfassung. Jahrbuch des Öffentlichen Rechts*, Vol. XIV (1926), p. 14; Becker, *Föderalistische Tendenzen*, Breslau, 1928.

\* The legal nature of such treaties is treated in: H. G. Ficker, *Verträgliche Beziehungen zwischen Gesamtstaat und Einzelstaat im Deutschen Reich*, Breslau, 1926.

## THE DISTRIBUTION OF ADMINISTRATIVE POWER

Nothing is more misleading than to concentrate attention on legislative power only, for this cannot give exact indication of the nature of the governmental system as a whole. Of what use is it to make laws if their execution is entrusted to uncontrollable and perhaps hostile agencies? Again, local authority may have quite wide powers to make rules, as in English health administration, but the standards of administration may be so scrupulously supervised by a central authority as to frustrate or amend their legislative activities.<sup>1</sup>

The Federal authority may carry out its laws and orders by its own body of officials, acting independently of the administrative machinery of the states. The purest example of this is America, but even here there are deviations (though not important ones) from the extreme, produced by the power of the states to co-operate in appointments to the Federal Executive. The other extreme type is where the Federation has legislative powers, but only a small body of federal officers, the laws being executable by the states.<sup>2</sup> Of such a nature was the Continental Congress which preceded the American Federation. Of such a nature, too, was the German Empire of 1871, though in some branches of its law-making powers it had executive authority and created an executive machine, namely, in its own postal sphere. But Germany was also the most prominent example of another conceivable type, that in which the states, being the executors of Federal laws, the Federation is endowed with supervisory power. This supervisory power again may vary in energy: it may be nothing more than the right to admonish and exhort, or it may be invested with some sanction which, operating in fact, or only as a threat, compels the observance of federal standards. The exploration of these devices takes us deep into the recesses of federal theory.

\* \* \* \* \*

The founders of the American Constitution were clearly permeated by the view that nothing less than a grant of executive power commensurate with the legislative, would be of saving value for their Union: 'the Articles of Confederation ought to be so corrected and enlarged as to accomplish (my italics) the objects proposed by their institution; . . . a national executive be instituted . . . and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.'<sup>3</sup> A *federal*, and a *national, supreme* Government were contrasted; the 'former being a mere compact resting on the good faith of the parties; the latter having a complete and *compulsive* operation'.<sup>4</sup> It was cogently argued that punishment could not in the nature of things be

<sup>1</sup> Pschorr, *Der Wirtschaftliche Aufschwung des neuen Reiches*.

<sup>2</sup> So Switzerland, Canada, Australia.

<sup>3</sup> *Doc. History*, III, 17 and 18; Resolutions 1 and 7.

<sup>4</sup> *Ibid.*, 22.

executed on the states collectively, and therefore, that such a Government was necessary as could directly operate on individuals, and would punish those only whose guilt required it.<sup>1</sup>

The power placed in the Federation in its prescribed and implied spheres was complete, legislative, executive and judicial. The supremacy of the Federation in matters of administration is settled very comprehensively by the constitution. 'The Congress shall have power . . . to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the U.S.A. or in any department or office thereof.'<sup>2</sup>

In simple terms, the President of the Union was made the executor of the laws of the Union, and was given officers to enable him to carry out his duty.<sup>3</sup> The officials act directly upon the individual citizens, with legal regard to the State governments.

With the growth of the legislative authority of the Union the administrative mechanism of the Union has become vast in size and exceedingly complex and various in its obligations. The main questions which have arisen touching its operation have been (a) the legal question, how far the State may legally put obstacles in the way of Federal officials; and (b) the political questions, whether, at any particular time, it was expedient of Congress to pursue policies which require an annoying increase of Federal officers in the states, and how far the states should be called in to execute certain laws concurrently with the Federation.

Two notable cases settled the legal question. Federal agencies are protected against attack by the states, the principle being emphatically asserted by the Supreme Court in *McCulloch v. Maryland*<sup>4</sup> that there is a 'plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control'. However, such powers are repugnant only when they interfere with the efficiency of the federal agency. The states also need defence. 'The agencies of the federal government are

<sup>1</sup> The same line of argument was pursued in *The Federalist*: 'It will be found that the change which it (the constitution) proposes consists much less in the addition of *New Powers*. . . . The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.' And, finally, Madison, explaining the nature of the constitution and examining how far federal and how far a national element prevailed, said: 'The difference between a federal and a national government as it relates to the operation of government is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their capacities. On trying the constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood.' *Ibid.*, III, 22; *Essays*, XLV, Madison; *ibid.*, XXXIX, Madison.

<sup>2</sup> Art. I, Sect. viii, Clause 18. Cf. Chapter on the Executive, *infra*.

<sup>3</sup> Art. II, Sect. ii, Clauses 1 and 2.

<sup>4</sup> See p. 212, *supra*.

only exempted from state legislation so far as legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.'<sup>1</sup>

Finally, in *Tennessee v. Davis*<sup>2</sup> the Court declared :

'It (the federal government) can only act through its officers and agents, and they must act within the states. If, when, thus acting, and within the scope of this authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority's powers, if the general government is powerless to stay the action of the State court—the operation of the general government may at any time be arrested at the will of one of its members.'<sup>3</sup>

The problem of the expediency of extending federal administration has arisen where there has been widespread and active opposition to a policy, and this principally with the enforcement of Prohibition.<sup>4</sup>

\* \* \* \* \*

**Germany.** In Germany a very different system operated. The states were not superseded as governmental agencies in the field in which legislative power was given to the Federation. The Reich was granted two classes of administrative power. There was (1) the power of 'superintendence'. 'The following affairs are subject to the superintendence'<sup>5</sup> (*Beaufsichtigung*) and legislation of the Reich . . .', and then followed the enumerated powers. Laband says: 'Politically it was sufficient if administration was directed according to uniform rules, and with concordant aims.' Superintendence was divisible into two types of activity (a) by means of detail in the Reich statutes, and these imposed rules of administration upon the states. The Bundesrat was even given power to make statutory rules,<sup>6</sup> which were obligatory upon the administrative departments in the states, and (b) Article 17 gave the Emperor 'the care of the execution'<sup>7</sup> of Imperial laws, exercisable, of course, through the Imperial Chancellor. This, apparently,<sup>8</sup> came to little more than the right to demand an account of what the states were doing. Where disputes arose over the interpretation of a law or order of the Bundesrat, this body was the ultimate arbiter between Reich and State.<sup>9</sup> Finally, the obduracy of a state

<sup>1</sup> *National Bank v. Commonwealth* (1870), 9 Wallace, 353, 361.

<sup>2</sup> Davis, a Federal revenue officer, having killed a man in the exercise of his duties and thus violated the law of Tennessee, claimed removal from state jurisdiction because he was a federal officer performing his duties. The Court held that such removal was proper (1879), 100, U.S. 257.

<sup>3</sup> Conversely the instrumentalities of a state government may not be taxed (*Collector v. Day*, 11 Wallace, 113, 127). In both cases the exemption acts upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax at discretion?

<sup>4</sup> Colvin, op. cit., p. 506.

<sup>5</sup> Art. 4, Constitution.

<sup>6</sup> By Art. VII, Clause 2.

<sup>7</sup> *Die Überwachung der Ausführung.*

<sup>8</sup> Laband, *Reichsstaatsrecht*, pp. 162-3.

<sup>9</sup> Again Art. XXXVI.

could only be overcome by armed intervention of the Reich—a process known as Federal Execution (*Bundesexecution*), the power for which was given by Article 19 of the Constitution.

So far, we have spoken of the class of administrative activity in which the states were independent, save for the superintendence and guardianship of the Reich, a field of continuous contention. But, (2), various articles of the constitution expressly gave the Reich positive administrative power over certain objects: these were foreign affairs, postal and telegraph affairs, naval and military affairs (with some exceptions already discussed), and the consular service. This is very small compared with America. A revealing illustration of the extent to which the states were administrators of Imperial laws is this, that the collection and administration of the tariff duties and other indirect taxes were expressly left in the hands of the states, but imperial officials supervised the customs officers and were attached to the higher administrative branches of the State revenue services.

What did superintendence mean in actual practice? <sup>1</sup>

Only in the administration of customs, railways, and military affairs did the Reich government take any appreciable and *direct* part. Everywhere else it was satisfied, obliged indeed, by the political situation to exercise only a general supervision. In the customs, railways, and military affairs the Reich entered into *immediate* contact with the subordinate departments and officials of the State by means of commissioners, controllers, inspectors, who observed the local administrators, drew their attention to omissions or possible improvements, and discussed the means of reform. But rebukes, prohibitions, or commands were not permissible. The main value of this intervening superintendence was that *information could be obtained by the Reich*, and the presence of the officers acted as a silent, but sometimes effective compelling power. The Reich Commissioners could not rectify mistakes at once or on the spot: the procedure was circuitous, for as a rule the Reich could only act upon the State government. Procedure was closely analogous to the process of international negotiations. If this failed the Bundesrat was called upon to judge in the last instance, and its judgement could only be enforced in the last resort by Federal execution.<sup>2</sup> The system worked with excessive friction and often broke down.

<sup>1</sup> *Die Reichsaufsicht; Untersuchungen zum Staatsrecht des Deutschen Reiches*, Berlin, Springer, 1917, pp. xx and 734.

<sup>2</sup> This circuitous method of acting upon the states was exercisable in one of two ways, (a) by the Kaiser's authority, executable, naturally, by the Imperial Chancellor and the Imperial Departments, and (b) by the Bundesrat. In the first case the Imperial authority found itself obliged to adopt certain rules of intervention, which alone were practicable. It was recognized that all the appropriate authorities in the State concerned must be set in motion until the highest, the Ministry or the Supreme Court of the State, had given its considered utterance on the dispute, before

The Reich did not act in all permissible cases, nor did it ever rigorously. Formalities wasted energy ; and the transit of complaints wasted time. Many laws, some of the importance of those on Free Mobility and Veterans' Pensions, were never properly applied through lack of good feeling between the Imperial and State officials. Yet, with time an improvement set in ; but here, again, is revealed a weakness which Triepel does not, perhaps, sufficiently emphasize : the will to co-operation grew, but ignorance or misunderstanding spoiled the effect of the laws and Imperial superintendence.

Two remedies were possible : to appoint a large number of Reich officials to intermingle in the superintended administrative fields, and secondly, to extend the practice of minute legislative regulation of Imperial powers. (This second point is of importance for Federal theorists.) In many cases the ordinary method of roundabout superintendence would have defeated the purpose of the Federal laws : for example, in matters of infectious diseases, insect pest and diseases of animals, instantaneous action was indispensable. Here *direct* supervision was enacted ; that is, the Reich obtained direct communication with the Departments of the States, and the right to give them orders. In other cases, like tax administration, emigration, technical examinations, standards, insurance, domicile, which followed upon the establishment of certain Federal taxes (on playing cards, sparkling wines, cigarettes, stamps, property and death duties), the Federal authority acted in much the same direct way as in customs and railway administration, while Reich Administrative Courts (e.g. for tobacco evaluation) signified administration by judicial decision.

However, in none of these instances, as is general in the U.S.A., did the Reich exercise power over individuals. There were a few instances of this : private insurance companies in so far as they operated beyond the limits of a single state, were directly subject to Federal jurisdiction in some respects. The essential characteristic, however, of German Federal superintendence was that only in very rare cases did it act upon individuals, it more frequently acted upon the subordinate administrative authorities of the states, but most generally it acted upon the Government as a whole.<sup>1</sup>

the Reich could step in and exhort the State authorities to change their mind and mend their ways.

The extraordinarily capable study, *Die Reichsaufsicht* (Federal Supervision), by Heinrich Triepel, Professor of Law at the University of Berlin, explores this subject. We follow this treatise, but obviously the few words we can here afford, cannot possibly reproduce the richness and subtlety of Triepel's work.

<sup>1</sup> Triepel employs the terms *unmittelbar* and *mittelbar* to describe direct and indirect supervision respectively. Recently Professor Anschütz has supplied more expressive terms : *Verbandsaufsicht* and *durchgreifende Aufsicht*, i.e. supervision which treats the State as a closed entity or association (hence *verband*), and pervasive or permeating supervision. The former was, and still is, the principal German method. Cf. Anschütz, *Handbuch des Deutschen, Staatsrechts*, I, and *Die Verfassung*.

This method was not very effective, for the Imperial authority was obliged to act with thick gloves on. In the end, its power in a dispute with a finally refractory state depended upon the judgement of the Bundesrat.

**The Bundesrat.** From this body it was impossible to expect a judgement which, technically, would meet the case. For though it was admirably constituted as a mediator between states, it was not organized to command them. It was a court of peers, each of whom owed his existence and welfare to the mutual forbearance of the other members. Small states could be overcome, and the merits of their case did not cause the council much anxiety. When large states, however, were concerned, a majority vote was always avoided and a compromise effected. Wherever a compromise could not be reached, the will of the individual state won the day. Since the Imperial Departments could never be sure of the Bundesrat's support, their confidence was weakened, and good cases against refractory states were left to go by default.

What a light this high executive organ, the Bundesrat, throws upon the nature of Bismarckian Federalism! Whether a state should act for the Federal welfare depended on a body which judged the case not upon technical considerations of weal or woe for the Federation as a government *including* both the Federation and the States, but with a State bias, by instructions obtained from their home governments, not upon the merits of the case as unfolded in personal discussion; the judges had different voting strength; the parties sat among the judges, and each judge in the body might be a party to-morrow, and need the votes of those who were parties to-day. It was a body well-calculated to thwart the exercise of central power, but not to generate enough of it. Yet this body was the direct and characteristic emanation of the peculiar federal spirit in Germany. It is irresistibly reminiscent of the old American Confederation, and of Hamilton's remark: 'We must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens—the only proper object of Government.'<sup>1</sup>

Moreover, as in all cases where the judicial is preferred to the administrative method, when the law courts, or the Imperial Departments or the Bundesrat settled a case, it was only a case that was settled. Efficiency depended upon the State and its officials; and whether the decision in the case was given a universal and permanent application depended upon the will of the states. Nor were the rules of the State *ipso facto* invalidated, nor could the judgement be executed, nor could such judgements, when given by the Law Courts or the

<sup>1</sup> *Federalist*, XV.



Bundesrat, be anything more than judgements on legality—the technical issues were, as a rule, beyond their competence.

**Prussia.** The hegemony of Prussia made itself manifest in this as in other aspects of the German Federation. It would seem, *a priori*, that Prussia could better than any other state have escaped federal direction. But its relationship to Federal superintendence was curiously complex. Prussia was more quickly responsive to direction, and less tempted to resist, than were other states, for her prestige as a good member of the Reich, upon which she laid great importance, was always at stake. She was too proud to risk trial by the Bundesrat; and often her projects of law were submitted to the Federal Departments for alignment with Federal Law.

Superintendent and superintended were often one and the same. The Imperial Chancellor was Prussian Prime Minister, and the Imperial Secretaries of State were made members of the Prussian Cabinet and Prussian representatives in the Bundesrat. *Supervision* in such circumstances lost any intelligible meaning. This had a tremendous reaction upon the other states; for, if Prussia were everywhere so powerful, indeed, if the Reich looked—nay *was*—so strangely like Prussia—why should the states render obedience? Nor could the Reich be strict with the states, for it might be met with a charge of partiality; nor retire out of its own sense of justice, lest its action be interpreted as cowardice.

Triepel concludes: ‘Only in the legal arrangement and the practical exercise of the right to superintend can we tell whether the Constitution of the Reich is a piece of paper or a living reality, whether the doctrine of the super-ordination of the Reich over the States is the truth or a lie.’

We have seen and we shall yet further see that this dictum is applicable to every facet of federalism. Let us observe it in the matters of Federal Execution.

Following the Bund of 1815 and the Confederation of 1867, the Constitution of 1871 provided for ultimate coercive action to be taken by the Federal authority to secure the obedience of the States. Article 19 said: ‘If members of the Federation do not fulfil their Federal obligations they may be compelled to do so by execution. Execution is to be resolved by the Bundesrat and carried out by the Kaiser.’ The article is as bare as can be, and it was deliberately made reticent to avoid the cold shivers which an atmosphere of appeal to armed compulsion must produce. If armed force was intended, it was intended as a final means; before that, constitutional authorities held that diplomatic mediation by the Bundesrat ought to come, and if that did not avail then a kind of ‘action in default’, government by Reich rules supported by the levy of taxes by Reich agents. It is clear that such execution could never be carried through

under the ægis of the constitution against Prussia, whose King, as Emperor, commanded the armed forces and whose friends administered the Reich Departments; nor against Bavaria or the other two Southern Kingdoms. Against the smaller States, other pressure availed. Though the Kaiser was to conduct the execution, its occasion had to be settled by the Bundesrat, and so, also, its plan of action, its commencement and termination.<sup>1</sup>

In the U.S.A. there is, of course, no such institution as Federal Execution, since the Federation acts directly upon citizens. Where necessary, of course, that is, when its powers are obstructed, the Federal authority may intervene with its troops if its other means are inadequate (Art. 1, Sect. 8, para. 1), and the Federation must protect the States against invasion and domestic violence (Art. 4, Sect. 4).

#### STATE REPRESENTATION IN THE FEDERAL ASSEMBLY

The essence of a federal compact is that powers are shared by a central and several local authorities, and the compact has its origin in the transfer of power originally held by the local authorities. The transfer takes place upon conditions, an essential part of which is the representation of the States in the Federal governing body. The problem is this: is it sufficient to secure representation in the ordinary legislative assembly elected by the people at large? No states entering into a federal association have so far thought such representation sufficient. They feared that their identity as states—as separate recognizable political entities—would be lost unless it was specially represented by certain special institutions. For no state entering into a Federal compact has wished or expected the extinction of its independent political life, though ready to surrender some part of it in exchange for the material and spiritual advantages of association. Like all individuals and groups the states have desired advantage without end, at no cost, beyond what it is absolutely obliged to pay. Jealousy for existing institutions, fear of the central authority, lest the ‘federal’ turn into a ‘consolidated’ state, the states be pulverized into the original elements, the people directly governed by the Federal government, caused a demand for a forum where the interests of the states as states could be represented, where the decisions of the Federal authority could be not only influenced, but actually and continuously moulded, by their ever-present fingers. To entrust such influence to the ordinary parliamentary body might be dangerous for the states, for decisions would be made by majorities, and here the states with the larger populations would overbear those with the smaller. Thus in every federation a legislative body was established to represent the states on terms different from representation in the other body.

<sup>1</sup> Trierpel, *op. cit.*, 665 ff.; Laband, *op. cit.*, I, 112, 233, 264.

The subject gives rise to a number of interesting speculations. What were to be the powers and composition of these States-Houses ; and why were these demanded ? what has been the actual result : were the states appreciably safeguarded ; and in what frame of mind do the representatives act ?

The making of the United States of America almost foundered upon this question. The supporters of close union, with a strong central power, like Hamilton, Madison and the Virginian delegation, demanded government by one chamber, based upon the proportionate strength of the various states.<sup>1</sup> Wherever a topic was discussed which affected the scope of federal powers and the supremacy of the Federation—and which topic did not ?—the minds of the assembly irresistibly began to simmer over the question : ‘ Yes, but how far shall the states be allowed to exercise an influence ? ’ Raised again and again, it was postponed until the end, in the hope that satisfaction with accomplished agreement, would make easier the swallowing of the last bite. The weightiest protagonist of the small states was John Dickinson : it was he who first suggested the compromise. ‘ It is essential that one branch of the legislative should be drawn immediately from the people ; and it is expedient that the other should be chosen by the legislatures of the states. This combination of the states governments with the national governments is as politic as it is unavoidable.’<sup>2</sup> Then the tempest was let loose : ‘ To depart from proportional representation (for this was the latent, but the real issue),’ said Madison, ‘ is inadmissible, being evidently unjust.’<sup>3</sup> ‘ No ! ’ said Dickinson. ‘ The preservation of the states in a certain degree of agency is indispensable. The proposed national (i.e. federal) system is like the solar system, in which the states are the planets, and they ought to be left to move freely in their proper orbits.’<sup>4</sup> Then, again, Wilson, ‘ The states are in no danger of being devoured by the national government ; I wish to keep them from devouring the national government . . . they must still be suffered to act, for subordinate purposes, for which their existence is made essential by the great extent of our country. I am for an election of the second branch by the people, in large districts, which would be most likely to obtain men of intelligence and uprightness, subdividing the districts only for the accommodation of voters.’<sup>5</sup> Finally, Mason expressed suspicion of the national government which was yet to be created.

‘ The state legislatures, also, ought to have some means of defending themselves against encroachments of the national government. And what better means can we provide, . . . than to make them a constituent part of the national establishment ? There is danger on both sides no doubt ; but we have only

<sup>1</sup> Elliot, *Debates* (cited *supra*), V, 134.

<sup>2</sup> *Ibid.*, p. 163.

<sup>3</sup> *Ibid.*, p. 167.

<sup>4</sup> *Ibid.*, p. 168.

<sup>5</sup> *Ibid.*, p. 169. And it is to be observed that this system was adopted in 1913 by Amendment XVI.

seen the evils arising on the side of the state governments. Those on the other side remain to be displayed; . . . Congress had no power to carry their acts into execution, as the national government will have.'<sup>1</sup>

Representation of the states as states was then accepted without dissent. But their *equality* within the Senate—the body representing the states—caused an almost suicidal dispute. New Jersey, represented by Paterson, violently opposed any other plan than equal representation and threatened to leave the Convention if proportionality were accepted. 'I would rather submit to a monarch, to a despot, than to such a fate.'<sup>2</sup> The large states<sup>3</sup> claimed proportionality, the small<sup>4</sup> equality. When the large states carried their solution,<sup>5</sup> the small states under New Jersey produced a completely alternative constitutional plan. 'See the consequences of pushing things too far. Some of the members from the small states . . . are friends to a good national government; but we would sooner submit to foreign power than submit to be deprived of an equality of suffrage and thereby be thrown under the domination of the larger states.'<sup>6</sup> The governing body, in this extreme reaction from the Virginia plan, was to be a congress of states in a single body—all on equality.<sup>7</sup>

The Convention was shaken to its foundations. Here was Madison thinking of the states in terms of 'counties in one entire republic',<sup>8</sup> of gradations in the importance of bodies 'from the smallest corporation with the most limited powers to the largest empire with the most perfect sovereignty',<sup>9</sup> and by his side, Hamilton, declaring that even as the suffrage was modified by qualifications of property among the citizens, so ought there to be a gradation for states.<sup>10</sup> There, declaring an unyielding resistance, was Johnson: 'The states do exist as political societies, and a government is to be formed for them in their political capacity, as well as for the individuals composing them. Besides the aristocratic and other interests (mark how manifold are man's motives!) . . . the states have their interests as such, and are equally entitled to like means (of defence).'<sup>11</sup>

The Convention, so cleft, was 'scarce held together by the strength of a hair'.<sup>12</sup> But by a narrow margin equality of representation was obtained.

<sup>1</sup> Ibid., p. 170.

<sup>2</sup> Ibid., p. 177.

<sup>3</sup> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia; Connecticut also adhered.

<sup>4</sup> New York (not small but on this side for party reasons), New Jersey, Delaware. Maryland divided.

<sup>5</sup> Elliot, *Debates*, V, 181.

<sup>6</sup> Ibid., p. 191, Dickinson.

<sup>7</sup> Pinckney's remark was just: 'The whole case comes to this: give New Jersey an equal vote, and she will dismiss her scruples and concur in the national system.' . . . He was profoundly right; there is more political science in that remark than in many volumes. Ibid., p. 197. Compare the controversy regarding the distribution of votes in the Reichsrat in the German Constitution of 1919—a short account of which is given later.

<sup>8</sup> Elliot, *Debates*, V, 252.

<sup>9</sup> Ibid., p. 256.

<sup>10</sup> Cf. Ibid., p. 258.

<sup>11</sup> Ibid., pp. 255, 260.

<sup>12</sup> Ibid., I, 358.

Upon a resumption of the discussion a battle raged around the basis of representation in the first chamber. Should slaves be taken into account? Should wealth be considered? Or should population alone count? The Southern states believed the economic basis of their civilization to be in jeopardy if they allowed their representation to be based upon population excluding slaves—South Carolina and Georgia being adamant to the last in this belief.<sup>1</sup> It is important that this part of the federal struggle should not be overlooked or under-emphasized. The Convention was composed of capable minds directed to a constitutional arrangement. That arrangement would subsist for generations, and it would immediately affect economic conditions. Those minds rarely deviated from the contemplation of concrete advantages and disadvantages, to lose themselves in vague and doctrinaire speculations. They were intensely practical: hence the bitterness of their struggles. They could almost count the results of their debates in current coin. All of them were incessantly afraid of the possibility that the North or the South or the interior would disturb the existing conditions and balance of economic interests.<sup>2</sup>

Mankind rarely knows the future with sufficient detail to act upon it, and even the few who do, cannot easily convince the majority; and thus, blessed with foreknowledge, one may be cursed with its inapplicability. The South for its own interests should have sought equality, for the growth of population was ultimately in those parts of the Union which were anti-slave; but for the moment they believed that immigration would increase their power. Equality, against which they fought, ultimately favoured them. In the lower house proportionality ultimately crushed slavery. It is one of the permanent truths of political science that one is obliged to act upon the facts as far as they can be seen, and that they cannot be seen very far; both make mistakes, those who strive to create on a view sweeping over generations, and those who see only over the next hedge. Population was accepted as the basis for the first house.<sup>3</sup> The number of representatives per state was then fixed upon as two; each representative to have a vote. The victory of the small states was clinched by the clause of the constitution which provides that no state shall be deprived

<sup>1</sup> Cf. Elliot, *Debates*, V, 266.

<sup>2</sup> 'The security the Southern states want is, that their negroes may not be taken from them, which some gentlemen within or without doors have a very good mind to do.' 'The perpetuity which it (an equality of votes in the second branch) will give to the preponderance of the Northern against the Southern scale is a serious consideration. It seems now well understood that the real difference of interests lies, not between the large and small, but between the northern and southern states. The institution of slavery and its consequences form the line of discrimination.' Elliot, *Debates*, V, pp. 309, 316.

<sup>3</sup> *Ibid.*, p. 316. A fortnight of tension passed; then Massachusetts having agreed to abstain, and Maryland no longer divided but all for equality, and North Carolina breaking away from the southern block, equality in the Senate was adopted.

of its equal suffrage without its consent.<sup>1</sup> Senators were to be chosen by the legislature of their state for terms of six years.<sup>2</sup> By the Seventeenth Amendment (1913), Senators are *elected by the people*.

**Germany.** We have no need to spend as much time on the German Federation. The German Bund created in 1815 was less a federation than an international assembly, the states being deemed to retain their full sovereignty. Since they threw so little into the common stock, their liabilities were small, and it was of less moment to demand or concede equality. The Bund endowed the Diet with no direct power over citizens, but merely established common relations among states. It was much less necessary to secure equality of representation in the latter system than in the former. Yet in the General Assembly every state had one vote: the legitimacy of sovereign states could not be disputed, and the only basis of association for legitimate sovereigns was a basis of equality. But there were such marked differences of political power between states like Austria, Prussia, and the rest, that perfect equality was ridiculous and no sane person, belonging either to a larger or a small state, would ever have expected it, and so the Smaller Council differentiated between the states. For ultimately the source of power and service insists upon being the source of decision and control, and he or the state that has no power (money, people, brains, land, character, cannons and poison gas) is not for long allowed to give orders to those who have.<sup>3</sup> Many German federal plans suffered shipwreck, until 1866, on the rock of representation; until the problem became not so much to discover the proper weight in a federation, but whether a federation could be brought about at all, with so many disputants jealous, not only of Prussia, but of each other. Whether Prussia's votes should be cast by its government uniformly, or divided, altogether or partially, among the provinces was an issue of great significance.

The North German Confederation did not issue from peaceful association, but from war. There was no reason to create a Bundesrat composed upon essentially different principles from before. Indeed, the nearer one could keep to old principles, the less controversy and the fewer objections would be raised to a federation. Bismarck

<sup>1</sup> Art. V.

<sup>2</sup> Art. I, Sect. iii.

<sup>3</sup> Compare the difficulties of securing a system of representation in an English Parliament in which the British Dominions would have representation. Those who are contemplating the constitution of a federal arrangement are faced with the dilemma of either admitting an authority to others without proportional regard to their contribution, or in default of a satisfactory solution reducing the power assigned to the organ of the association. The latter part of the dilemma helps to explain why the League of Nations is refused the powers which its most enthusiastic supporters claim for it. It is very well exemplified in the German Economic Council, for whose history in this particular respect see H. Finer, *Representative Government and a Parliament of Industry*, London, 1923, pp. 98-126. Cf. also H. Duncan Hall, *The British Commonwealth of Nations*, London, 1920; Sir F. Pollock, *The League of Nations*, 2nd Ed., London, 1922.

increased the Prussian vote in the new Bundesrat to seventeen, justifying that increase on account of the annexed states. This addition of votes, which gave Prussia seventeen votes out of forty-three, was essential since the Bundesrat was designed to be the sovereign assembly. If the decisions were to be made there, if Prussia's power and goods could be taken by Federal taxation, and her inhabitants constrained by federal laws, she must have a fair say in that council and a vote corresponding to her political importance. Prussia had at this time five-sixths of the total population of the Confederation. It could not demand as many as twenty-two votes, for that number constituted a majority, and the possession of this number would convert the Confederation into a too obviously extended Prussia. Although Bismarck was anxious to give this constitution the character of a treaty-made convention, with the sovereignty of the states strongly marked and acknowledged, he had committed himself to a Reichstag based upon universal suffrage. He did not see that this body might win for itself that electoral loyalty which gives power to men and assemblies, and thus, that it might come to take political precedence of the Bundesrat. Of that later.

The Federal Assembly of the Zollverein followed this distribution of votes, the Southern states being unable to demand any weightier representation because their economic necessities now made them suppliants for inclusion, and Prussia had the power to dictate the terms of entry.

This same distribution of voting power was adopted for the Bundesrat of the Empire in 1871. Bitter conflicts took place between the Bavarian representatives and Bismarck over Bavaria's representation in the Bundesrat, but Bavaria was overpowered.

Under the Confederation of 1866, Prussian interests were safeguarded by the clause that constitutional amendments required a two-thirds majority, and since Prussia possessed seventeen out of forty-three votes, she could always defeat an amendment to which she was opposed. In the Empire, the inclusion of the southern states brought the total votes to fifty-eight, and this meant that the two-thirds clause was now unavailing. Therefore, it was prescribed that no constitutional amendment was valid if fourteen votes were cast against the proposal. This safeguarded Prussia; but it also safeguarded the four Southern states—Bavaria, Würtemberg, and Saxony alone had fourteen votes between them. Similarly for any big enough combination of the smaller states. This division of power is a remarkably good illustration of the effect of particularism—in any real emergency Prussia could stop an amendment; the Southern states together could; and so could the smaller states in association.<sup>1</sup>

<sup>1</sup> A few years after the establishment of the Empire, the balance of strength in the Bundesrat was threatened by the inclusion of representation for Alsace-Lorraine. Now

**The Efficacy of State Representation.** One other question must be answered before we see how far the intentions were borne out in practice. In the American Federation the votes were given to the senators individually and it was not provided (and as far as we can discover not discussed) that senators should vote other than according to their own discretion. At any rate no clause of the constitution requires them to be bound by the instructions of their states. In short, they were to be general representatives. Similarly, too, in the Australian Commonwealth.<sup>1</sup> In proportion, apparently, as the states insist upon their sovereignty the subject assumes a different complexion, whether the States are monarchies or republics also affects the question.

German statesmen and jurists, however, asked, how could the identity of the state be really represented without instructions by the government which for the time being incarnates the state? From the Bund of 1815 onwards, the state-assembly took on the aspect of a collection of ambassadors of sovereign states. The members were indeed the sovereigns of the states, *in delegato*. For the body in which they appeared was the reservoir, if not the immediate source, of sovereignty: a congress of *princes*. As the reservoir is the product of the original fountains, so were the delegate-votes the product of the sovereignty located in the respective capitals. The Bundesrat of 1867 and that of 1871 embodied this principle. Laband's summary phrases<sup>2</sup> describe the intention of the founders perfectly:

'All the German state sovereigns and the senates of the three Free Towns considered as a unity—*tamquam unum corpus*—possess the Imperial sovereignty. But the rulers and senates exercise these member-rights through deputies (*Bevollmächtigte*), as in the old German Empire the Estates did not appear personally at the Reichstag, but were represented by ambassadors. The Bundesrat, therefore,

these votes were instructed according to the constitution by the Regent (*Statthalter*) who ruled in the name of the Kaiser. It was universally feared that these votes would always be cast for Prussia. It was therefore arranged that the votes of the territories should not be counted if they were cast in favour of Prussian proposals, and this virtually extinguished the voting power, though not the advisory power of Alsace-Lorraine. The controversy was made acuter by the fact that Prussia had taken over the administration of the little state of Waldeck, and so acquired an extra vote. 1879; and Law of 31 May 1911, Art. I. Final distribution of votes: Prussia, 17; Bavaria, 6; Saxony and Württemberg, 4 each; Baden and Hesse, 3 each; Mecklenberg and Braunschweig, 2 each; the other seventeen states, 1 each; and Alsace-Lorraine, 3. In all, 61.

<sup>1</sup> Cf. Quick and Garran, *op. cit.*, p. 416, where Foster (Comm. I, pp. 494–6) is cited: 'John Tyler, in 1836, before he was President, resigned his place in the Senate because the Virginia legislature had instructed him to vote in favour of expunging the resolution, which he could not conscientiously approve. These doctrines are now abandoned. The Senators consider themselves as members of an ordinary legislative body. They pay no more attention to the instructions of State legislatures than do members of the House; and in fact, since their terms are longer, they are more inclined to disobey them.' This citation is one of many used by the Australian commentators to illustrate 'the functions and basis of the Senate' (*op. cit.*, p. 415).

<sup>2</sup> *Deutsches Reichstaatsrecht*, 7th Ed., 1919, p. 61; and *Staatsrecht* (Rdn. 1911).



represented the sovereign of the Reich, that is, the totality of associated governments; it is that organ of the Reich, through which the sovereign will is manifested.' <sup>1</sup>

This theory and arrangement had certain corollaries. First, votes which were not instructed were not counted,<sup>2</sup> and secondly, states with more than one vote were obliged to cast them uniformly.<sup>3</sup> Thus the sovereign states were saved the embarrassments following upon a belief that sovereignty could be split into contradictory parts.

Further, not all states were allowed equal participation in the Bundesrat. This is a striking difference from other federations. Bavaria, Würtemberg and Baden, for example, were not allowed to vote on matters relating to the tax on beer other than on proposals to increase it;<sup>4</sup> Bavaria and Würtemberg could not vote on matters relating to the administration of the Reich Posts and Telegraphs,<sup>5</sup> nor could Bavaria vote on matters relating to Imperial laws or residence <sup>5</sup> or certain railway subjects.<sup>7</sup>

\* \* \* \* \*

How far have these attempts to secure the identity of the states been successful? But first, what does this phrase mean—the identity of the states? A scrutiny of the argument used by the states reveals these meanings: all desired to stop increases of federal power, legislative and administrative; each desired to be able to influence the activity of the federation by considerations which affected it particularly, to

<sup>1</sup> Cf. Roëll u. Epstein, *Bismarck's Staatsrecht*, p. 110 ff.: 'I believe that the Bundesrat has a great future in that it has, for the first time, to act at the summit of a federal body, to exercise the sovereignty of the whole Reich without taking away the beneficence of monarchical authority or the separate authority of the individual states; for sovereignty does not reside in the Kaiser but in the totality of Governments.'

'It is extremely useful, whether you call it wise or not, to have the manifold points of view of twenty-five Governments introduced directly into these discussions, in a way which we have never had in a unitary State. Large as Prussia is, we have yet been able to learn from the smaller states, and, on the other hand, the smaller states have learnt from us. There are twenty-five ministries or Princes, of which each one, unobscured in its sphere, draws to itself the intelligence and wisdom which flourishes there and is entitled to express itself independently in the Bundesrat, without limitations, while the individual states have many limitations which stop up the springs even there where they might flow. . . . Therefore I should like to bid you not to criticize the Bundesrat. I see particularly in this institution the kind of Palladium for our future, a great guarantee for the future of Germany.'

<sup>2</sup> Constitution, Art. VII.

<sup>3</sup> Ibid. The delegates were responsible to their governments for adherence to their instructions, and for reporting on their work. As a rule these delegates were ministers or civil servants, and thus subject to the disciplinary code of their state. It was never the business of the Bundesrat to ask whether the delegate was speaking or voting as he had been instructed. The Bundesrat's legitimate interest was the delegate's right to be present and vote—and that was decided by a formal warrant of appointment. It was entirely a matter for the states in what form instructions should be given, whether in detail or as a general recommendation. The number of deputies sent could not be more, but could be less, than the number of votes.

<sup>4</sup> Art. XXXV; and Laband's footnote, op. cit., p. 63.

<sup>5</sup> Art. LII.

<sup>6</sup> Art. IV.

<sup>7</sup> Arts. XLII–XLVI.

cause it to do or refrain from doing things which would be of special benefit to a particular state. There is no body of historical investigation which enables us to answer the question whether the senates of federations have been actuated by considerations really different from those regulating a member of the unitary representative assembly, whether in a federal or a unitary state.

Information available about the Senate of the U.S.A. shows this, that Senators are actuated by the special interests of their states; they refer in debate to those interests, and not seldom adopt the state standpoint as the basis of their argument, and of their vote. This, however, is without the conscious and strained motive of maintaining the position of their *state* in the Union; and it derives from the perfectly natural and universal tendency of individuals and groups to relate general questions to their own experience and environment, and in the U.S.A. there is the special reason that all representatives are held rather more strictly to their constituent's local interests than elsewhere. It is too difficult to discriminate between the extent to which the member of the House of Representatives and Senators from the same state represent the interests of their states; we know only that the former are rather more parochial in their views than the latter, more involved in the smaller issues of their constituency. Even then, this can be partly accounted for by differences in the constitution of the two Chambers, their different period of office, their numbers, and modes of debate. On the whole the unitary Chamber, the House of Representatives, is as zealous for the special interests of its states as are the Senators.

One notable example among hundreds, of attention to state interests, is the activity of the South Carolina Senators, in the tariff controversies of 1829-60,<sup>1</sup> when the State opposed the protection of the industries of the North and East. But this soon spread over the whole South. Nor can we say that in this respect the Southern members in the House of Representatives voted any differently from the Senators.

**From State to Section.** In fact, it is not the unit of social life embodied in the states which is effectively and conspicuously expressed in debate and legislation. For American development since 1789 has been strongly inimical to state boundaries, and events have caused the State to lose significance as a constituent part of the nation. Firstly, the states, other than the original thirteen, that is, thirty-five new states, were created under the Federal constitution.<sup>2</sup> It is not too much to assume that in these the notion of attachment to the Federation as a whole overwhelms, in a greater degree than in the

<sup>1</sup> Cf. J. G. Van Deusen, *The Economic Bases of Disunion in South Carolina* (Columbia Univ. Press), 1928, and further, Russell, *Economic Aspects of Southern Sectionalism*.

<sup>2</sup> 21 before 1861, and 15 since, of which 6 since 1890.

original states, the notion of separate identity. Of the thirty-five states created since the Union, twelve were made from 1867 onwards, that is, when the supremacy of the nation over the states, of union over secession, had triumphed ; in short, when, on as great an issue as can trouble a nation, the idea of the indestructibility of the Union, its transcendent authority in spiritual and material things, had been impressed on all minds while they were in the white-hot condition of civil war. Again, the new states were particularly attached to the Union and to that extent, less separatist, by reason of the importance to them of federal help in establishing such necessities of civilization as roads, canals and railways. Lastly, many of these states were peopled largely by immigrants who came to live in 'America', not in Wisconsin, or Minnesota, or Illinois.

All these things diminished the sense of state differences and heightened that of community.

Secondly, when the Union began to operate the Senate contained twenty-six members ; it steadily increased to ninety-six. Two state representatives can stand out more conspicuously in the smaller number, and those with experience of affairs, conducted in committees and assemblies, know that the physical and psychological conditions of a small assembly allow opportunities of display which are necessarily repressed in a larger one.<sup>1</sup> To-day each state is checked by forty-seven others.

Thirdly, state boundaries as containers of political life and authority have been burst, and in many cases destroyed, by changes in the nature of industry, commerce, agriculture and transport. The early colonies located and spread themselves according to the lie of the land. Wherever a physical feature unconquerably hindered the advance of settlement, instead of helping it as river valleys did, the frontier hardened and became a state boundary. State identity, so far as area was concerned, was a direct product of surroundings unmasterable by man and horse power, and the primitive and inexact tools of a steamless untechnical age.<sup>2</sup> When routes were opened by road and steam, human aspirations, inflated by the rise of new industries and the development of old, urged successive waves of pioneers onwards to frontier after frontier, and the new channels cut across the old state boundaries. This is a phenomenon no stranger than the revolutionary changes in English local government which have taken place in the last 100 years. No economist, no railway student, no literary critic, none of those busy organizations which purvey religion in the U.S.A.,

<sup>1</sup> I am referring particularly to the lack of closure on debate.

<sup>2</sup> E. C. Sempel, *American History and its Geographic Conditions*, Boston, 1903, Chaps. III, IV ; F. W. Turner, *The Frontier in American History*, New York, 1921 ; and an earlier work, by the same author : *Rise of the New West, 1819-1829* (Vol. XIV of *The American Nation, A History* (ed. by A. B. Hart), New York and London, 1906) ; and F. L. Paxson, *History of the American Frontier, 1763-1893*, Boston, 1924.

can think of America in terms of states. The talk is of 'belts', 'sections', the 'Mississippi', the 'Gulf States', the 'Middle West', 'New England', the 'Mason-Dixon Line', the 'Atlantic Seaboard', the 'South', the 'Middle States'.

The diversity of interests still exists, but the area of its operations is enlarged, and the quality of its manifestation is altered. The states are important, but less than before. To this enlargement of the unit of effective diversity which is called Sectionalism, we shall later give more attention.

Finally, *binding together into consentient bodies all representatives of people and states, are the Political Parties*, organized with a thoroughness and strength undreamed of by the most lurid imaginations of 1787. The Political Parties are the great containers of American political life, not the states. They found programmes, administer oaths, apply discipline, distribute rewards and punishments, settle accounts. Their appeal is to the whole nation, and if they affect a different-coloured suit and lingo, and even turn their coats according to their state—the Programme is one and indivisible, though, to be sure, some would say it is None and Invisible. It is in the formation of programmes that the sections of the country, sometimes the states, receive the concessions they especially demand; and the real debates and votes to preserve the identity of the states, or more properly nowadays, the interests of the Sections, take place in forgatherings of 'bosses' and in the purlieus of political conventions. It selects the men for the all-powerful committees, and systematically orders the quiet destruction of obnoxious bills. The Party is the middle-man of state, sectional and national interests; and in this it does little that is of a nature different from the party in a unitary state like England or France.<sup>1</sup> Only that the U.S.A. is not a country, but a Continent, and the task is therefore more difficult, perhaps impossible.

In their adherence to and interpretations of State Rights the two main parties have each suffered many transformations.<sup>2</sup>

<sup>1</sup> Cf. Woody, *Is the Senate Unrepresentative?* *Political Science Quarterly*, XLI, 232: 'On the whole we may conclude that party allegiance is, as a rule, more important in determining how a Senator votes than the supposed interests of his section. He is apt—quite properly from the party point of view—to regard his sectional loyalty as fully discharged when he urges upon the party caucus, or the party leaders, approval of the measures specially favoured by his constituents.'

<sup>2</sup> Jefferson and his party began as a party of state rights: the resolutions on nullification, the Virginia and Kentucky resolutions of 1793,\* drawn up by him and Madison were for decades a reservoir of arguments, for those who thought in terms of state sovereignty. Jefferson uttered the 'strict constructionist' argument in classic terms in relation to the Bank of the United States. But office and power imposed obligations upon them which could only be acquitted in terms of nationality and not of State Rights. Thus Jefferson acquired Louisiana by purchase from France, an act which the constitution did not allow, and Jefferson knew it. He trusted not in the Federal compact to justify this usurpation, but in the people at

\* See p. 326 ff, *infra*.

Throughout the history of the Union, State Rights have waxed and waned in the minds of political parties, and taken serpentine shapes as much, if not more, in accordance with concrete problems, as in harmony with an unchanging intuition about the merits of state independence. The tendency converted Calhoun from nationalism to southern sectionalism, Webster from New England sectionalism to nationalism, the Democratic party from secessionism to strong centralization under President Wilson.

In short, the whole conception of State Rights and the disputes concerning them have been vitally affected by the growth of party. For American parties, like all other parties, could not survive without the advocacy of a policy as comprehensive as the whole society to be served. Such a policy can only appeal to a majority by a proper compromise between all the interests represented in it. Both the physical environment of the U.S.A. and the ideals which its people pursued diminished the importance of state independence compared with all the other things which seemed to the citizens desirable.

Then, too, the period between 1865 and 1900 was peculiarly one in which parties were dominated by rich men, who were purchasers of legislative policies, which would positively encourage or refrain from discouraging their business plans. Selected as Senators, by the state legislatures which were liable to corruption, and were often corrupt, the tendency was to return men to the Senate who were either directly interested, not in the state they came from, but in certain industrial projects, or who were the 'instructed' agents of such men.<sup>1</sup> This was the period when the Senate earned the appellation of 'the millionaire's club'. To the parties, then, state independence has been but one among many ingredients in their calculations; hence it is not surprising to find that the Senate is no more representative of State Rights than the House of Representatives, and that the House of Representatives is no more representative of State Rights than are the members for Wales or Scotland in the British Parliament. To come from a state which has the special pride of an area, which is especially

large \*: the concrete and recognized good was to overcome 'metaphysical subtleties'. At this juncture, too, the Federalists did not desire to see their commercial and shipping policies jeopardized by votes emanating from an essentially agricultural territory like Louisiana. They became for the nonce State Rights men, and suffering for another ten years the slings and arrows of outrageous nationalism, they even met at the Hartford Convention in 1814 to consider the special sectional attitude which New England should adopt towards such-like measures.†

<sup>1</sup> Cf. Stephenson, *Nelson W. Aldrich* (1930).

\* 'The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the constitution. The Legislature, in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on the country for doing for them what we know they would have done for themselves had they been in a situation to do it.'

† See their resolutions, 327, *infra*.

recognized in the constitution, gives the representative something extra to talk about, a hobby, a peculiarity, a feature which conspicuously distinguishes him from others who come from places which are not as his. In the last resort it even gives him something with which to continue debate when all other subjects are exhausted. But there is not much more than this in the representation of the American states in the Senate.<sup>1</sup> Of an importance overwhelming that of the states is the Section.

**The Section.** Although the federation rests legally upon a State-Nation compact, it rests politically upon a Section-Nation relationship; the framework and the standard of reference is the Nation, and within it the Sections claim and are accorded what they need. By Section is meant a part of the U.S.A. with 'its own special geographical qualities, its own resources and economic capacities, and its own rival interests, partly determined in the days when the geological foundations were laid down', such as New England, the Middle States, the South-east, the South-west, the Middle West, the Mountain and Plains States, the Pacific Coast.<sup>2</sup> Such sections are well marked, and have played a larger part in American political life than have the states, though Sectional interests are often expressed for election campaign purposes in terms of state politics. The Sections are marked by easily observable external signs.<sup>3</sup> There are, then, differences in culture and physique. All these differences are more significant in the Sections than in the states: for the qualities which constitute the differences are not confined to separate states, but are common to several contiguous states, and controlled by the same natural features.

History shows the potency of these differences.<sup>4</sup>

In recent years New England has become the opponent of Federal aid

<sup>1</sup> In the 71st Congress, in January, 1931, in 20 States the representation was of the same party in both Houses; in 8 cases there was considerable difference; in 20 cases there was a slight difference. (Cf. *Congressional Directory*, 1931, 3rd Session.)

<sup>2</sup> F. S. Turner, *Sections and Nation*, *Yale Review*, October, 1922, p. 2.

<sup>3</sup> For example, half the capital invested in manufactures in the U.S.A. is in the North Atlantic section composed of New England (six states) and the Middle States (three states); the great bulk of wheat corn, cattle and swine comes from the central states of the Upper Mississippi Valley. The North Atlantic sections with one-third the total population paid about one-half the federal income and profits tax in 1920. The highest ratio of motor-cars to population is the region of the great Wheat States west of the Mississippi: the lowest ratio is to be found in the South and the Middle States of the Atlantic Seaboard—and the ratios are an index to the diffusion of wealth.

<sup>4</sup> E.g. New England and the Embargo Act of 1807; the South Carolina protest against the tariffs (Van Deusen, op. cit.); the East and the West in the matter of internal improvements (Coman, *Economic Beginnings of the Far West*; Gammon, *The Presidential Campaign of 1832*, Baltimore, 1922; the South v. North contest regarding slavery; the struggles around the Bank of the U.S.; and most interesting, the struggle between East and West since 1890 for progressivism in the democratic electoral experiments, and in the matter of tariffs and the income tax, and the control of the banking and money magnates (see particularly, Stephenson, *Nelson W. Aldrich*, 1930, of great importance for the judgement of this period). Cf. also Sempel, op. cit., Chap. XVI; A. M. Schlesinger, *New Viewpoints in American History*, New York, 1922, Chap. II.

for roads, education, and the stronghold of finance and the tariff-protecting manufactures. She is the natural opponent of the agricultural interests of the West and the South, and of those railway rates controlled by the Interstate Commerce Commission which give an advantage over her ports to those further South. She and New York, New Jersey and Pennsylvania controlled the Republican Party until the West grew strong enough to flood the party with their own Progressivism.<sup>1</sup> A Boston editor supported the Governor of Massachusetts, who in 1922, said that New England was a 'unit', by adding: 'While certain artificial limitations exist between the New England states, there are no real barriers between them; essentially they are one.'<sup>2</sup> Formally this Sectionalism is symbolized by the Conference of the Governors of New England states, and a New England States Council composed of various economic groups has been established to speak for the area on semi-official occasions'. Further, a New England Bureau has been set up at Washington. 'Adjustments are in fact', says Turner, 'made not between individuals in the Nation, nor between states, but between sections'. He gives as examples that when the tariff was shaped by Southern and Western interests, instead of a centralized bank plan, a regional bank reserve system was adopted. An agricultural Bloc<sup>3</sup> composed of Western Republicans and Southern Democrats cuts across party lines for the benefit of the agricultural areas. And the Middle West has, on several occasions, exerted itself to the extent even of forming such new groupings as the Grangers, Populists, Progressives, the Non-Partisan League, the Farm Bureau Federation and the Farmers Bloc.<sup>4</sup>

We are therefore justified in saying this at least: that the American Federation does, in fact, rest upon a federal relationship between the Sections, and this relationship is realized not through the formal legal acknowledgement of Sections, but through the formal legal recognition of the states which are still the juristic counterparts of the Federation. The vociferous boosting of their own State by Americans is not evidence of any antagonism to the Union. It is, therefore, not surprising to find that the Senate is not representative of the states in the sense required by those who, at the foundation, secured equality of representation in the Senate. National and Sectional development have reduced the value of the Senate as the arena of states.

<sup>1</sup> Cf. A. N. Holcombe, *The Political Parties of To-day*, 2nd Ed., New York, 1925; E. M. Sait, *American Parties and Elections*, New York, 1927; R. C. Brooks, *Political Parties and Electoral Problems* (Harper), 1923.

<sup>2</sup> Turner, article cited, p. 15. Here also appears a citation from the *Boston Transcript* in the Spring of 1922. 'The New England states have different governments and are separate and distinct political organizations, but they are bound together by geographic, historic, political and industrial interests.'

<sup>3</sup> Capper, *Agricultural Bloc* (Harcourt), 1922.

<sup>4</sup> Cf. M. Ostrogorski, *Democracy and the Organization of Political Parties*, trans. from the French by F. Clarke, 2 vols., London, 1902, II.

Is it, then, of no moment as a federal body? Since the members of the House of Representatives speak with the experience of their states and in their interests, it would seem that the Senate has no special reason for existence, from a *Federal* standpoint. Yet the United States is so wide-flung, is a Continent larger than all Europe, including Russia, and the population is so unevenly distributed, that the older states, and these and others thickly populated, are overwhelmingly represented in the House of Representatives. The essence of representative government is that there shall be representatives. Now, it is not necessary that the representatives shall be mathematically proportionate to the numbers to be represented, but it is important that as many as possible, compared with the total membership, shall represent a constituency which desires to be conspicuous. For, even apart from the convention that the majority rules, numbers are potential reiteration, and reiteration up to a certain point produces an impression proportionate to its extent. The whole theory of representative government rests upon the idea that though others may be kind to you, they cannot be relied upon continually to bear you in mind when laws are being made or offices and money distributed. Certainly, the sparsely populated states of America could not without grave danger to their interests allow themselves to be represented according to population. To them the equality of votes in the Senate is a boon, for in the House they are in danger of being ignored. Therefore the Senate serves an important purpose—it affords a forum where the possibility of being ignored is diminished; where it is possible to secure at least one-forty-eighth of the time available, and not a few 437ths of the time. This is apparently the value which Woodrow Wilson placed upon the Senate.<sup>1</sup>

The value is important to states of sparse population. But there are those who complain of the burden which this throws upon the rest. Is it just, on the majority principle, to allow senatorial equality to overcome the majority in the House of Representatives? There is, in fact, a striking disparity between the representatives of the states in both Houses. A recent apologist<sup>2</sup> for the Senate says:

'New York with ten million people has two senators, as has Nevada<sup>3</sup> with less than eighty thousand. If the Senate were based on the proportional principle, New York would have 270 Senators. The eighteen smallest states just about

<sup>1</sup> Woodrow Wilson, *Congressional Government*. Cf. Senator Pepper, *In the Senate*, p. 26 ff., on the volume of business coming from his state (Pennsylvania), all of which, however, is of rather a petty nature. On the general problem he says (p. 36): 'Senators, it soon becomes evident to the man who joins their company, should serve the nation as a whole, while at the same time conserving the special or peculiar interests of their own states. The problem for a senator who wants to serve the nation as well as the State is one which only a few can solve successfully. . . .' See pp. 42 ff. on the economic battle of the Sections.

<sup>2</sup> Lindsay Rogers, *The American Senate*, New York, 1926.

<sup>3</sup> That is Nevada has less than  $\frac{1}{10}$ th of New York's population.



equal New York in population: they have forty-five Representatives to New York's forty-three.

'The population of Pennsylvania is larger than that of all New England, but Pennsylvania has two Senators, while New England has twelve. States containing less than one-fifth of the population of the country return a majority of the Senate. Anomalies could be multiplied.'

One critic<sup>1</sup> has observed that the violation of the principle of number was a necessity at the time of the establishment of the Union, but 'it was never imagined that the inequality would not be limited to that which existed or might grow out of the states at first forming the Union'. The original inequality was serious, but not glaring, as it has become. In 1893 the mining states almost forced a ruinous silver-standard upon the community. 'It involves the principle of one set of men imposing taxes for another set of men to pay.' Others argue that 'radicalism' is made the more possible owing to the influence obtainable by a demagogue who wins a Senatorial seat in a sparsely populated state. Burgess said,<sup>2</sup> that this 'relic of the confederation invites revolution'.

A serious situation may one day arise out of the disparity in representation. So far a violent conflict between the large states and the small states, the peculiar difficulty which the Founding Fathers feared, has not occurred. Nor, in fact, has equality of representation, by causing a divergence between party representation in the two chambers, made much difference to legislation. But sometimes a Senate vote, representative only of a minority of voters, has confronted a majority of the House of Representatives. This has happened when parties have been closely matched in the Senate, for example, in the 45th, 52nd, 54th, and 65th Congresses. Here a minority of popular votes has been transformed into a majority of Senatorial votes. A careful analysis of the votes in the 65th Congress, 1917-19, shows that seven votes in the Senate relating to the liquor traffic, including the 18th Amendment, would have been defeated if popular representation had prevailed. For here the East was defeated by the West. On Woman's Suffrage there was also no popular majority. The East desired a reduction of the Surtax: the Western States defeated this desire. The Senate Bill, taxing the products of child labour, which the North wanted and the South did not, was sent to the *Finance* Committee by the vote of the Southern States, and so given the presumptive stigma of unconstitutionality, whereas the North desired the Bill to go to the Interstate Commerce Committee, which would have whitewashed it as a constitutionally-exercised incident of the Commerce Clause. The final results of this analysis are these: that in the last fifty years only 6 per cent. of all

<sup>1</sup> S. W. McCall, *Atlantic Monthly*, Oct., 1903, reproduced in Reinsch, *Readings on American Federal Government*, 1906, p. 135 ff.

<sup>2</sup> *Political Science and Constitutional Law*, I, 49.

contested votes were unrepresentative ; that where the thinly-populated states are favoured by such votes, as they are in a number of them, it is due to the presence of a Senate majority representing a minority of the population ; that, finally, proportionate representation in the Senate would have modified but not have eliminated divided control (a different party majority in either House) in eight cases out of the last twenty-five Congresses ; and that Parliamentary deadlocks are not due to equal representation in the Senate. There has been no continuous alliance of the thinly-populated states against the more densely populated areas. On the whole, concludes the analysis, there has been unrepresentative government, but the result so far from being bad, has been 'surprisingly good'.

Yet there is potential trouble in this rule. Whether that trouble materializes depends upon the future distribution of population and whether the policies of the Sections are moderate or extreme. If the population increases faster in the areas already under-represented in the Senate than in those over-represented, the present position will be aggravated ; and if the latter impose upon the former laws which outrage ideas of property or morals, then a revolutionary situation might arise. But no one can measure exactly when, and under what conditions, people would proceed from mild protests and parliamentary tactics, to threats of secession and violence. The disparity of representation is the more obvious since the Seventeenth Amendment established the direct election of Senators by the people of the States.

Thus we have seen (1) that the Federal constitution could only be formed if the fears of the small states were calmed by equality of representation in the Senate ; (2) that this fear was sharpened by the desire to maintain state independence ; (3) that in the actual evolution of the Federation the small states have never been allied against the large states or vice versa <sup>1</sup> ; (4) that owing to the growth of party the country has been divided, not into states, but into opposed political organizations which have reconciled the states within their fold to each other and to the Union ; (5) that owing to the industrial and commercial evolution of the nation the rival interests have been, and are, Sections, rather than states, though formally the State political institutions have been the official spokesmen of Sectionalism from the time of the Kentucky and Virginia Resolutions ; (6) that the Senate has not been notably more representative of state interests or of Sectional interests than the House of Representatives ; but that (7) owing to the equality of representation in the Senate it has been liable to a political pressure on behalf of the less populous states, impossible in the same measure in the Lower Chamber, and owing to its smallness the representative character has for the less populous states been enhanced far above that in the Lower Chamber ; (8) in short, that it

<sup>1</sup> Hamilton prophesied that this would not happen : Elliot, II, 213.

is a forum where the states may be very much talked of, but where the preservation of the identity of the states has become a forgotten or a factitious thing, far smaller in importance than preserving the identity of the Senator. Bryce was not able to name a single point in which the Senate was important as a purely Federal institution : all his praise is given to it as a body restraining the impulses of the House of Representatives,<sup>1</sup> and because ' it has provided a basis for the Senate unlike that on which the other House of Congress is chosen ',<sup>2</sup> which seems extreme pedantry.

We have more to say about the Senate in the section which treats of Second Chambers ; for the Senate was designed to exercise also the ordinary functions of a second chamber, to check the impulses of the Lower Chamber, and to co-operate with, in order to check, the Executive. The intentions and results of this are reserved for later treatment.

**The German Empire.** What were the legal powers of the Bundesrat, and how were they, in fact, exercised ? Bismarck put the Bundesrat in the centre of his constitution, because power lay with the princes, and he desired it to stay there, to be tapped at his command.<sup>3</sup> The constitution of 1871, therefore, gave the Bundesrat ample powers. The legislative power was exercisable by the Bundesrat and Reichstag. Both Houses had the initiative and the consent of both bodies was necessary for an imperial law.<sup>4</sup> Every member of the Federation was empowered to propose bills and to speak on them, and the Presiding Officer was bound to bring them to discussion.<sup>5</sup> Now the Emperor, as such, had no right to introduce bills into the Bundesrat, but they could be introduced in the name of the Emperor and treated as Prussian or *präsidial* (emanating from the presiding authority) measures. A Bill accepted by the Bundesrat was to be introduced into the Reichstag by the Imperial Chancellor, acting now not as the presiding officer of the Bundesrat, but as the supreme agent of the Emperor,<sup>6</sup> for only the Emperor, not the Bundesrat, had the right to introduce measures into the Reichstag. Such a Bill was to be represented in the Reichstag by members of the Bundesrat or by special commissioners appointed by that body. Now German jurists have observed that in every law there are two elements, both necessary to their validity : the subject-matter of the law, and the sanctioning force, or command.<sup>7</sup> The consensus of opinion among constitutional lawyers was that command, the sanctioning authority in the Empire, though nowhere expressly defined in the constitution, lay, by the nature of the Federation, in the Bundesrat.<sup>8</sup> The final action on all

<sup>1</sup> *American Commonwealth*, I, 125.

<sup>2</sup> *Ibid.*, I, 99.

<sup>3</sup> Cf. Kaufmann, *Bismarck's Erbe in der Reichsverfassung* (1917).

<sup>4</sup> Art. V, Clause 1.

<sup>5</sup> Art. VII, Clause 2.

<sup>6</sup> Art. XVI.

<sup>7</sup> Laband, *Staatsrecht*, II, 24 ff.

<sup>8</sup> Meyer-Anschütz, *Lehrbuch des deutschen Staatsrechts*, 6th Ed., pp. 581-2 : ' As in an individual state the bearer of the power of the state is a monarch, so in

bills was, therefore, taken by the Bundesrat, even when these had originated in that body itself and had returned from the Reichstag without any amendment.<sup>1</sup>

Besides this great power, the Bundesrat had (a) the function of making orders giving precision and detail to laws wherever the statutes themselves had not vested such a function in a named institution, or where administrative defects in the laws had been disclosed,<sup>2</sup> and (b) judicial power as derived, first, from the ordinance-making power and secondly, in relation to Federal execution against a refractory state,<sup>3</sup> thirdly, as an appellate court where a state denied justice or offered no adequate relief,<sup>4</sup> and, fourthly, the decision of controversies between the several states upon the appeal of one of the parties,<sup>5</sup> and between the Executive and representative assembly of a State upon appeal of one of the parties (but provided that the constitution of the State has not already designated an authority for the purpose).<sup>6</sup>

How far did the special representation of the states in the Bundesrat effectively secure the identity of the states from encroachment and help them to obtain legislation specially moulded to meet their separate interests? The effective power was determined by (a) Prussia's position; (b) the position of the Emperor and the Imperial Chancellor; (c) the technical conditions of policy-making; (d) the desire to maintain friendliness among the associated governments in the new Empire; and, finally, (e) the power of the Reichstag.

Prussia controlled seventeen votes in a total of fifty-eight. This was a guarantee that policy would, with a little manipulation, be made mainly by her, and that, to that extent, there would be a limit to the self-determination of the other states. The South German states, Bavaria, Württemberg, Baden and Hesse, had between them almost as many: sixteen votes; and the small states mustered twenty-one votes. In practice, several of the small states found themselves economically dependent upon Prussia, owing particularly to Prussia's control of railways and her military predominance.<sup>7</sup> But there was

the Reich the totality of the allied governments is the bearer of the authority of the Reich. It is to be considered as the holder of legislative authority. Its sanction imparts the character of law to a measure. This totality of the allied governments is represented by the *Bundesrat*. Therefore the sanction operates through a resolution of the *Bundesrat*. Even a bill which has been sent to the Reichstag by the *Bundesrat* and accepted by it without amendment needs the further acceptance of the *Bundesrat* to become law.'

<sup>1</sup> See Meyer Anschütz, op. cit., pp. 48 ff.; and Speech in Reichstag, 11 June 1883, Bismarck.

<sup>2</sup> Art. VII, Clause 1: 'to take action upon the general administrative provisions and arrangements necessary to the execution of the imperial laws, so far as no other provision has been made by law'; and 'to remedy defects which may be disclosed in the execution of the imperial laws or of the aforesaid provisions and arrangements'.

<sup>3</sup> Art. XIX.

<sup>4</sup> Art. LXXII.

<sup>5</sup> Art. LXXVI, Clause 1.

<sup>6</sup> Ibid., Clause 2.

<sup>7</sup> Laband, *Die Geschichtliche Entwicklung der Reichsverfassung*, Jahrbuch, 1907, p. 20, and Nawiasky, *Grundprobleme der Reichsverfassung*, 1928, p. 54.

always the possibility that the South German and other states might overbear Prussia. Therefore, Prussian policy was directed to preliminary agreements, outside the Bundesrat, with the larger states, especially Bavaria; indeed, it became a tradition that wherever possible no contested votes should occur; and the South German states were, in general, ready to follow Prussian leadership, this readiness being evoked by Prussia's power to protect their own political status, their reserved rights, and the guarantee of their constitutional-monarchical régimes.<sup>1</sup> The smaller states were thus very largely excluded from consideration—as Laband says, they were treated almost as a *partie négligeable*.<sup>2</sup> Prussia was rarely outvoted. This arrangement between the large states and Prussia, while depressing the influence of the small states below their voting strength, added naturally to the power of the large states, especially of Bavaria.<sup>3</sup> The Imperial Chancellor was President of the Bundesrat, and since he was chosen by the Emperor, that is, the King of Prussia, here was yet another compelling sign of hegemony.

**Kaiser and Imperial Chancellor.** The Kaiser was President of the Federation. He was, hereditarily, the Prussian King, so that all the authority which attached to the Kaiserdom was added to the Prussian Kingship. The Prussian Kingship had also its own representation in the Bundesrat. Now the Kaiserdom itself was a German institution formally and intentionally; but it was held by a dynasty which sought as much as any other the particular ends of its own land. Necessarily, the Kaiserdom was an all-German institution with a Prussian soul.

Nor was this all. The Imperial Chancellor was, as a rule, at once the sole responsible Minister in the Reich, and the Prime Minister of Prussia. As Imperial Chancellor he was the head of the Imperial Departments, and the presiding officer of the Bundesrat. Thus it was possible for the Prussian Prime Minister (as Imperial Chancellor) to use the Imperial Departments to prepare drafts of bills which he could then have introduced into the Bundesrat as Prussian projects. Could the Imperial Departments avoid Prussianizing their drafts and memoranda? The other states received bills too late for discussion and alterations.<sup>4</sup> The states were dominated by Prussian Imperial Chancellors, or men, like Hohenlohe, a Bavarian, who were the friends of Prussia. When Secretaries of State were to aid the Chancellor, Prussia appointed them to be the Prussian representatives in the Bundesrat. In 1907, for example, nine out of the seventeen

<sup>1</sup> Nawiasky, *op. cit.*, p. 34.

<sup>2</sup> *Loc. cit.*

<sup>3</sup> Bilfinger, *Der Einfluss der Einzelstaaten auf die Bildung des Reichswillens*, 1923, p. 18. Cf. Goldschmidt, *Das Reich und Preussen im Kampf um die Führung von Bismarck bis 1918* (Berlin, 1931).

<sup>4</sup> Cf. Bilfinger, *Der Einfluss der Einzelstaaten auf die Bildung des Reichswillens*, 1923, p. 14 ff.

Prussian representatives were Imperial Secretaries of State. Of the other eight representatives several were Prussian officials.<sup>1</sup>

It was convenient, technically, for the drafts of bills to be prepared by the Reich departments and introduced by the Chancellor; and these were dealt with as Prussian proposals. Thus the constitutional initiative of the Bundesrat was usurped. The Bundesrat Committees which prepared the rules and orders under the ordinance-making power became practically Imperial Departments,<sup>2</sup> guided by Secretaries of State who were appointed by the Emperor who was a Prussian.

Two other peculiarities strengthened the unitary notion over the federal, thereby overcoming the full force of particularism and adding weight to Prussia. The first was the fact that the self-same Imperial Chancellor and Secretaries of State who represented the Reich (and Prussia) in the Bundesrat, also led the Reichstag. The psychological result was that the Bundesrat was compelled to accept policy, which it might otherwise have modified or rejected, in order to avoid discomfiting the government which had to answer the Reichstag; or, in other words, what the Reichstag majority was determined to have, the Bundesrat tended to accept, state sovereignty notwithstanding.<sup>3</sup> Secondly, an incident in 1880<sup>4</sup> led to the growth of the view that the Emperor might veto a bill for its substance, although the constitution did not give him this power, and this view restrained the Bundesrat.<sup>5</sup>

Thus, the Bundesrat was not, in fact, predominantly the organ of state self-preservation, but one whose activities were dominated by Prussia and the larger states, the latter receiving from Prussia the minimum of concessions consistent with the retention of their support. Laband's conclusion was: 'The constitutional association of German states in one political entity does not imply the equivalence of their political, social, and economic conditions and needs. Therefore, side by side with the federal unity expressed in the constitution are many relics of a confederal relationship, which struggle against majorization<sup>6</sup> in the Bundesrat; but, of course, only to the advantage of the states.'<sup>7</sup>

Now, although the Reichstag was not constitutionally the sovereign body of the Reich, it had been endowed with law-making powers and the right to vote supplies. It was impossible to govern entirely against the will of the Reichstag, for through the political parties it represented the people, hence it became a significant rival of the Bundesrat, acting, of course, more than that body, upon unitary considerations.

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<sup>1</sup> Cf. Triepel, *Unitarismus und Föderalismus*, p. 67.

<sup>2</sup> Ibid., p. 68.

<sup>3</sup> Ibid., p. 69.

<sup>4</sup> For a full account of the affair, see Hänel, *Studien*, II, 48; Poschinger, op. cit.; Roëll u. Epstein, op. cit.

<sup>5</sup> Op. cit., pp. 69-71.

<sup>6</sup> This is a literal translation of a German term which means, not only *outvoted*, but being *overcome by a bare majority*.

<sup>7</sup> *Geschichtliche Entwicklung*, p. 22.

Comparing the American Senate and the German Bundesrat these reflections emerge. An institution never for long operates otherwise than as the power put into it, whatever men pretend, and whatever the nominal distribution of power. The real federation in Germany was between Prussia and the major states—mainly between Prussia, Bavaria and Württemberg: that is, these states alone possessed a sufficiency at once of associative and dissociative power to produce a federation, while the smaller states could have federated among themselves but could only be dominated in a federation with the others. And the functioning of the Bundesrat clearly portrays this. In America, on the contrary, the Congress is a democratic body: within its constitutional powers it is supreme, nor does the President represent any particular state. All parts of the country, therefore, have at least some say in Congressional counsels, and the Senate a directing part.

The Senate was created when disparities between the states were not so great as to-day, and, therefore, the good in union outweighed the harm from equality of representation. The German Federation was founded at a stage of inequality not the same, but similar, to that now prevailing, after one and a half centuries' experience, in the U.S.A., and if America, as it is to-day, were to give itself a new constitution, it is very doubtful whether it would adopt equality in the Senate. It might conceivably do this to avoid the chances of war, and in the belief that where power exists it will prevail over votes, and that when this does not happen peacefully and by lobby tactics, secession threatens. Entities without contributive significance in a Federation cannot maintain their status. For status results from the possession of concrete qualities, or recognition by others which may be given even when the former are absent. In Germany the federation, and the distribution of strength in the Bundesrat, were founded upon the first, the qualities objectively possessed by the states, and the result was the progressive decline of meaning of the small states in the Federation. In the U.S.A. the federation, and the Senate, were founded rather upon the second, the legal recognition of an equality which did not exist: and the result has been much the same as in Germany: the progressive decline in meaning of the small, sparsely populated and momentarily resourceless states. But this decline in the U.S.A. has been slower than in Germany, for the idea expressed by equality in the Senate was potent, one for which people were prepared to make sacrifices. Nor has its place been taken by the idea of the hegemony of a particular state or Section, though it is true that various Sections have been powerful in converting the Senate to their uses. The idea of Senatorial representation of states has been ever more powerful than that in Germany, and is likely to remain so because of the exceptional geographical extent and the economic diversity of the U.S.A. Finally,

the memory of the sword hung like a pall over Germany, stifling voices and greying over distinctive colours, but the American Federation was framed in peace and dedicated to liberty.

### THE JUDICIARY

Every federation has a division of the judicial function between the central and the state authorities. The contrast between the Federations in this respect is full of interest, and affords a mass of instruction about the diverse ways in which political independence can in practice be modified for a good wider than that of the independent unit, and how sovereignty may be variously distributed. The U.S.A. exhibits, comparatively speaking, the most complete subjection of the states to federal justice and the most complex system: while Germany before the War left considerable freedom to the states. It is enough here to devote our attention to two points, viz., the extent of Federal jurisdiction, for this, by inference, will denote what jurisdiction remains to the state, and the settlement of disputes between states.

*The U.S.A.* America has the longest continuous history of judicial institutions in a federation. Her first federal courts were provided for by the Congress of the Confederation, but they were weak and of a temporary nature.<sup>1</sup>

The constitution of 1789 greatly extended the Federal authority's judicial power, and few things better illuminate the nature of this 'more perfect' association. For as Hamilton said<sup>2</sup>: 'It is in the nature of sovereignty, not to be amenable to the suit of an individual

<sup>1</sup> Petition of Merchants and Citizens of Philadelphia, Congress, May 1779, cited in J. S. Brown: *The United States: a Study in International Organization*, p. 219: 'Certainty in the Laws is the great Source of the people's Security, and an adherence to prior adjudication is the principal means of attaining that certainty. But the Court of Appeals in its present state is continually fluctuating, the same judges seldom acting for more than a few months. In a Court where there is this constant change it is impossible that fixed principles can be established, or the doctrine of precedents ever take place. Every obstacle that creates unnecessary delay ("Judges . . . not being members of Congress, would have more leisure for the discharge of their employment") in the administration of Justice, should be carefully removed, but when the seeds of this delay are sown in the very constitution of the Court, the People, rather than have recourse to a Tribunal of that kind, will be induced to give up that right. . . .'

Nor was it long before the appeal court found itself without means of making its authority good. The case of the *Active* (Brown, op. cit., pp. 220 ff.) revealed the Confederate Courts' weakness and among the resolutions then passed by Congress were these: 'That no act of any one state can or ought to destroy the right of appeals to Congress' (on facts and law), 'That a control by appeal is necessary, in order to compel a just and uniform execution of the law of the nation'; 'That the said control must extend as well over the decision of juries (this was the issue in the Case of the *Active*) as judges'; otherwise arises 'a construction which involves many inconveniences and absurdities, destroys an essential part of the power of war and peace entrusted to Congress, and would disable the Congress of the United States from giving satisfaction to foreign nations complaining of a violation of neutralities, of treaties or other breaches of the law of nations, and would enable a jury in any one state to involve the United States in hostilities; a construction which for these and many other reasons is inadmissible'.

<sup>2</sup> *Federalist*, LXXXI.



*without its consent.* This is the general sense, and the general practice of mankind ; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the states.' The immunity was, as we shall immediately see, surrendered to a remarkable extent.

One question is very significant in the philosophy of federation : whether the Federation should have its own inferior courts, or establish only a Supreme Court for appeals.<sup>1</sup>

Sentiment was against the idea of inferior Courts. Frequently considerations of utility cannot prevail over strong sentiment, until there is actual experience of disutility ; and the small states were afraid of an extension of Federal jurisdiction in ordinary matters ; though naturally enough (if we look closely into human motives) they supported proposals that the judiciary be the guardian of the constitution and treaties. Whether there should be inferior Federal Courts was left, after much wrangling, to Congress to determine.

Article III of the Constitution defines the judicial power of the United States,<sup>2</sup> and the organization of the Courts has been settled

<sup>1</sup> John Rutledge, who argued in favour of leaving to the State courts decisions in the first instance, said that 'the right of appeal was sufficient to secure national rights and uniformity of judgements', and that the alternative policy would cause 'an unnecessary encroachment on the jurisdiction of the states, and unnecessary obstacles to their adoption of the new system'.\* Madison sought in vain to overcome this objection by arguing how awkward it would be to bring appeals to the Supreme Court from distant places, especially as appeals might be multiplied to a most oppressive degree.

<sup>2</sup> United States, Constitution, Art. III, Sect. I : 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.'

Sect. II : 'The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States ; between a State and citizens of another State ; between citizens of different States ; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

'In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

'The trial of all crimes, except in cases of impeachment, shall be by jury ; and such trial shall be held in the State where the said crimes shall have been committed ; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.'

Sect. III : 'Treason against the United States shall consist only in levying war

by the successive Judiciary Acts passed by Congress beginning in 1789.<sup>1</sup> We cannot explore all the complications of the system which has arisen, but these are its main traits: There is a Supreme Court, several Circuit Courts of Appeals, and about eighty District Courts (originally there were thirteen). This organization has had, from the point of view of the political scientist, an eventful history: one which has not evoked sensational attention, but which exhibits the inexorable, if quiet, influence of a growing environment upon institutions. For, as with legislation and administration, the condition of serviceability is continual adaptation. The judicial functions of the Federal Courts follow from the Constitution. By far the best short and reasoned statement I know is that to be found in Chief Justice Jay's opinion in *Chisholm v. Georgia* delivered in 1793.<sup>2</sup>

against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

'The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.'

<sup>1</sup> F. Frankfurter and J. M. Landis, *The Business of the Supreme Court*, New York, 1927.

<sup>2</sup> *Chisholm, Executor, v. Georgia* (1793), 2 Dallas, 419. Jay, Chief Justice . . . : 'It may be asked, what is the precise sense and latitude in which the words "to establish justice", as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the 2nd section of the 3rd article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz. 1st. To all cases arising under this constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2nd. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3rd. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation is bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested it would not be equal or wise to let any one state decide and measure out the justice due to others. 7th. To controversies between two or more states; because domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory; and because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better that she should prosecute their demands in a national court, than in a court of the state to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated. Because, in cases where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole

The Supreme Court has original and appellate jurisdiction. It has original jurisdiction 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party'. When the phrase 'those in which a state shall be a party' is completed by the cases enumerated: 'to controversies between two or more states and (formerly, but not now) between a state and citizens of another state'—two important problems arise, the one relating to the conditions of interstate controversies, the others to the suability of a state by a citizen. We need not occupy ourselves long with the second point. Even Hamilton and Marshall, neither of them enthusiasts for 'state' sovereignty, held the view that the State could not be sued.<sup>1</sup> But in *Chisholm v. Georgia* (1793) an action was upheld by the Supreme Court against the State of Georgia, and one of the associate justices declared that 'when a state, by adopting the constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty'. This conclusion the states passionately resisted, and their protests led, in 1798, to the 11th Amendment, restricting the judicial power of the United States by the withdrawal of suits against one of the states by citizens of another state, or by citizens or subjects of any foreign state. But the Supreme Court has interpreted the article so as to reduce the immunity of officers of a state from the consequences of unconstitutional behaviour,<sup>2</sup> whether from their own will or in executing an unconstitutional statute.<sup>3</sup>

Next, 'because domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory; and because, in a free country, justice ought not to depend on the will of either of the litigants'—the Supreme Court was vested with the settlement of controversies between two or more states. In this respect the Supreme Court has played a magnificent part, for its authority has been evoked in thirty-nine cases, and its judgements have been respected and peacefully carried out. A former Assistant

judges of the justice due to the latter; and true republican government requires, that free and equal citizens should have free, fair and equal justice. 9th. To controversies between citizens of the same state, claiming lands under grants of different states; because, as the rights of the two states to grant the land are drawn into question, neither of the two states ought to decide the controversy. 10th. To controversies between a state, or the citizens thereof, and foreign states, citizens or subjects; because as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people, ought to be ascertained by, and depend on national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people. . . .'

<sup>1</sup> *Federalist*, LXXXI.

<sup>2</sup> *Pennoy v. McConaughy* (1891), 140 U.S. 1, 10.

<sup>3</sup> *Reagan v. Farmers' L. & T. Co.* (1894), 154 U.S. 362; *Smyth v. Ames* (1898), 169 U.S. 466; *Ex parte Young* (1908), 209 U.S. 123; *Hartman v. Greenhow* (1880), 102 U.S. 672; *Poindexter v. Greenhow* (1884), 114 U.S. 270; *U.S. v. Peters* (1809), 5 Cranch, 115; *U.S. v. Lee* (1882), 106 U.S. 196; and Marshall, in Elliot's *Debates*.

Attorney-General, Mr. Charles Warren, has emphasized the magnificence of this record and the self-control of the states which, sovereign and hostile, agreed to submit to a court of justice.<sup>1</sup> If the states were as hostile and conscious and desirous of a separate destiny as he pretends, then, indeed, this achievement is superb; for sound reason alone must have been abnormal, remembering European history, to overcome such obstacles to peace. I cannot help but think that these obstacles were a little factitious, for the habit of deference to the King in Council was of long standing,<sup>2</sup> and the insistence of the states upon their sovereignty was revolutionary and doctrinaire ebullience rather than the vital expression of a substantial political experience. The Fathers of the Constitution were, many of them, lawyers, not warlike men; they saw beyond the limited horizons of their constituents, who were, indeed, presented by them with a *fait accompli*. In any case, the Court came into existence easily, with hardly any opposition, once the will to a 'more perfect union' had been declared.

Such a court, with such functions, is the most original, the most distinctively American contribution to political science to be found in the constitution. It is even more. It is the cement which has fixed firm the whole Federal structure. Or, to change the metaphor and to use Jefferson's quaint words, it is 'a kite to keep the henyard in order'. Now every federation must have such a court, although it may be organized in many different ways. For in a federation the right to make war is denied to the states, often they have no more than a small force of militia, and they are forbidden from making treaties without federal consent. Therefore they must come to judgement.<sup>3</sup>

The efficacy of a court is not to be judged only or principally by the number of cases which have come before it; and to say that from 1789 to 1923 there were thirty-nine controversies involving eighty-one reported decisions of the Supreme Court proves nothing. The substantial question is: what was the nature of these controversies: did they gravely affect the life of the parties, the 'vital interests' as they have been called in international conflicts, and would they, perhaps, have led to warlike operations had there been no federation and no Supreme Court? The cases have been made easily accessible in a treatise published in 1920,<sup>4</sup> at which date only thirty-one cases had been pursued. A large majority of them have revolved about boundary disputes, that is, claims to territory, while about one-third have related to economic or social injury to interests

<sup>1</sup> C. Warren, *The Supreme Court and Sovereign States*, Princeton, 1924.

<sup>2</sup> Russell, *The Review of Colonial Legislation by the King in Council*, and Schlesinger, *Colonial Appeals to the Privy Council*, *American Political Science Quarterly*, XXVIII, 279; 433.

<sup>3</sup> So in Switzerland, Australia, Canada.

<sup>4</sup> *Judicial Settlement of Controversies between States of the American Union*, Cases, 2 vols.; and *Analysis of Cases*, 1 vol.; by James Brown Scott, 1920.

caused by the policy of another state. The issues, then, have been, in essence, which of two or more states shall govern certain tracts of territory or inland waters, and whether the actions of a state having an unfavourable economic or social effect upon another are justifiable.<sup>1</sup> In most cases wealth or the sources of wealth has been the originating cause of the dispute. Some of these might have produced war in Europe had other conditions predisposed countries to war: but on the whole the disputes have been too trivial to be themselves the cause of war.<sup>2</sup>

In some of these cases bloodshed occurred, and men were already militarily alert. Can we supply the reasons, then, why the decisions were accepted? The main reason lies in the psychology of the parties. The Supreme Court was recognized as the final court of appeal; to deny it was to deny the Constitution, and to take the grave risk, the almost certain risk, of forcible repression by Federal forces even if you were overwhelmingly right and your opponent utterly wrong. For, says Bacon, 'as for the first wrong, it doth but offend the Law, but the Revenge of that Wrong putteth the Law out of office'. To smite before or after the Court has spoken is to put the Constitution out of office. Only once has any state been put to that extremity, and that caused the Civil War. Civil War, even dissolution of the Union, is the inarticulate major premiss which constrains the states to appear before the Courts.

This premiss is sustained by certain other factors. The states live in a comity, in an association, the spirit of which, created over one hundred and fifty years ago, was civic concord, the original and positive basis of this Federal state. This is the established order; a long history, and the general way of life common to all the citizens, (as well the material utilities of union), require no vindication; it is the occasional and sectional dissent which has to be justified.<sup>3</sup> No

<sup>1</sup> *New York v. New Jersey* (Sewage in New York harbour), 1922; *Wyoming v. Colorado* (division of the Laramie River to Colorado's benefit), 1923; *North Dakota v. Minnesota* (floods caused in Dakota by ditching system of Minnesota).

<sup>2</sup> The most serious cases have been *New York v. New Jersey* in 1829 relating to the sovereignty over the waters of New York Harbour and Hudson River. *Rhode Island v. Massachusetts*, in 1838-46, which involved 150 square miles (say a piece of land 10 by 15 miles), *Missouri v. Iowa*, in 1850, about a valuable area sized 2,000 square miles (where slave or free soil was involved also), *Louisiana v. Mississippi*, in 1906, involving oyster beds in the waters between the two states, and *Washington v. Oregon*, in 1909, involving the Columbia River salmon fisheries. Then in *South Carolina v. Georgia* (1876) the diversion of waters was contested, in *Louisiana v. Texas* (1900) the use of a quarantine embargo to damage the commerce of New Orleans challenged, in *Missouri v. Illinois* (1901) the former sought to enjoin the diversion of Chicago's sewage into the Illinois River alleged to be likely to carry typhoid into Missouri, in *Kansas v. Colorado* (1902) the question was raised whether a state could deprive another of water by irrigation works. Since that date further similar cases have arisen.

<sup>3</sup> Ellsworth's famous speech in the Connecticut Convention gives us evidence of the spirit informing union: 'Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary; we all see and feel this necessity. The

large body of Americans can psychologically fly from the National Presence, in whose bosom they have been born or in which they have sought refuge. No dispute in America begins, then, with a psychological heritage of hostility to provoke the contestants.

Again, the sovereignty of an American state is perfect, but restricted. There is the habit and tradition of being overruled; if a state is not empowered to apply supreme and comprehensive authority to a territory, of what avail to war about a strip over which one has only a few weak municipal powers? In proportion, perhaps, to the intensity and comprehensiveness of sovereignty it is worth acquiring a greater area; it is much easier to alter the boundaries of a parish or district council than that of an American state, and easier to do this than alter the boundaries of nations like the U.S.A. or Great Britain.

Finally, freer mobility, the existence of a common citizenship and certain norms of government which apply all over the U.S.A., make easier any local adjustment to an adverse decision than it would do in a European interstate quarrel. For, although the inconveniences of removal of an industry, or personal migration, to another state in America may be deplorable, they are easier and more possible than in Europe, where, in fact, such things are, as a rule, absolutely impossible on any large scale. The easier the remedy for a decision the more lightly can it be entertained. If the decisions of the Court could not be applied without real severity the states would be less disposed to seek its judgements.

**Appellate Jurisdiction of the Supreme Court.** The Supreme Court has appellate jurisdiction in every case to which the federal judicial power extends, save for its original jurisdiction, and with such exception and under such regulations as the Congress shall make.<sup>1</sup> Congress has made the Circuit Court of Appeals final in cases of diversity of citizenship, patent, trade mark and copyright cases, in cases under the revenue and criminal laws, and in admiralty cases.<sup>2</sup> But a Court of Appeals may certify any question to the Supreme Court, and the Supreme Court may require a Court to certify any question.

Appeals<sup>3</sup> may go direct to the Supreme Court, in the following cases: where the jurisdiction of the court is in issue (on the question

only question is, shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This constitution does not attempt to coerce sovereign bodies, states, in their political capacity. No coercion is applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent state, it would involve the good and the bad, the innocent and the guilty, in the same calamity.

‘But this legal coercion singles out the guilty individual, and punishes him for breaking the laws of the Union.’—*Elliot, Debates*, II, 196–7.

<sup>1</sup> Art. III, Sect. II, para. 2.    <sup>2</sup> *Judicial Code*, Sect. 128.

<sup>3</sup> *Ibid.*, Sect. 238.

of jurisdiction alone); in prize causes; '*in any case that involves the construction or application of the constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any Treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States*'. Where a Treaty, statute or action under the U.S.A. constitution has been validated by the highest state courts the Supreme Court may be appealed to on writ of error; similarly where an authority under a state has been attacked as repugnant to the constitution, treaties or statutes of the U.S.A. If, on the other hand, where the federal statutes and actions have been *upheld* when challenged, or a state statute or authority be invalidated upon challenge, the Supreme Court may yet review the decision by *certiorari*. And, further, it may cause any case in which a title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States.<sup>1</sup>

It is clear that jealous hands have provided that no legislative or executive act of the Federal authority shall come irrevocably under the judicial review of a state court.

**The State and the District Courts.** How far do state courts participate in administering Federal law? Now the principle is that the state courts must interpret the law *save where they are excluded*. They may be excluded by the constitution which gives certain original jurisdiction to the Supreme Court, they may be excluded by the acts of Congress creating inferior Courts.<sup>2</sup> The state courts are *excluded* in crimes against the United States, suits for penalties and forfeitures, civil causes, admiralty and maritime jurisdiction, seizures and prize cases, patent and copyright cases, bankruptcy proceedings and suits against consuls and vice-consuls. The motives for this exclusion seem obvious: either the self-protectiveness of the United States or the fear of international complications, or the need for a view more extended and impartial than can be expected in all state courts, prompts Congress to entrust matters exclusively to federally appointed judges. In other cases, including suits which may involve the constitution, treaties or federal laws, or citizens of different states, or citizens of a state and foreign states or citizens, under the postal laws, interstate commerce laws, national banking associations, a suitor may proceed either in the District Courts or the State Courts. Elaborate arrangements are, however, made<sup>3</sup> for the removal of an action from

<sup>1</sup> *Judicial Code*, Sect. 237.

<sup>2</sup> Congress cannot cause the State courts to accept a jurisdiction they do not wish, and at times, the States have refused to accept jurisdiction.

<sup>3</sup> *Judicial Code*, Sects. 28-34. Cf. Burdick, *The Law of the American Constitution*, New York, 1922, p. 110, for a summary.

a State Court to a District Court, and seem designed to secure impartiality of the court and the equality of the law as between citizens of different states or in any collision between citizens of the same state relating to property under grants of different states.<sup>1</sup>

**Germany.** There is quite a remarkable difference between the judicial organization of the U.S.A. and that of the German Empire between 1871 and 1919, and that difference has suffered very little modification even by the Weimar constitution. It consists in this, that whereas in the American judicial system the national authority is evidently conceived to be above that of the states, its Courts intervening to secure federal judgement in federal matters, in the German system the states were left with considerable freedom. In fact, the constitution of 1871 contained no comprehensive article on the Judicial Power like Article III of the American Constitution. The right to administer justice was considered to be an immediate and vital issue of sovereignty, which, being the possession of the states, ought not to be infringed.<sup>2</sup> Therefore judgement was left to the states in Imperial law as well as in their own. Had this been carried out to its extreme, one of the important impulses to federation, expressed constantly since the beginning of the nineteenth century, would have been stultified, namely, the desire for uniformity of certain legal principles regarding citizenship, property, master and servant, common carriers, negotiable instruments, debts, bankruptcy, and many others.<sup>3</sup> For, though the German Empire could at its inception rely on a higher level of judicial capacity and impartiality

<sup>1</sup> *The Circuit Courts of Appeals.* These have no original jurisdiction. They are courts of appeal for all cases excepting those in which appeals and writ of error may go directly from the District Courts to the Supreme Court. They are courts of last instance for all cases arising under a large number of Federal laws, and the extent of this final jurisdiction has been extended in the measure in which it was desirable and necessary to free the Supreme Court for more important matters, mainly for cases in which the constitutionality of Federal state statutes and actions were in dispute.

<sup>2</sup> Laband, *Reichstaatsrecht*, p. 340: 'They (the States) exercise this jurisdiction by virtue of their own right and in their own name, but not as isolated entities, rather as members of a higher unity, and they are not sovereign in this exercise, but bound by rules laid down by the Reich.'

<sup>3</sup> See its expression in Savigny (not that he was in its favour): *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. by A. Hayward, London, p. 67: '... the great diversity of the provincial laws is complained of; and this complaint is not confined to the differences between different German States; for often, even in the same country, provinces and towns have systems peculiar to themselves. That the administration of justice is impaired and intercourse impeded by this diversity, has often been asserted; but experience is silent upon the point, and the true ground is probably different. It is to be found in the indescribable power which the bare idea of uniformity has so long exercised in all directions throughout Europe; a power the abuse of which we were formerly cautioned against by Montesquieu ...' And again, p. 182: 'We are agreed as to the end in view: we desire a sound system of law, secure against the encroachments of caprice and dishonesty; as also, the unity of the nation, and the concentration of its scientific efforts upon the same object. For this end, they are anxious for a code. ...'



than the American Union at its inception, and in many places even now, there was still to be taken into account the very natural possibility that even capable and impartial judges may differ; they do in the same court, how much more so might this be expected to occur as between different places far away from each other in space and social and economic circumstances?

The Empire, therefore, used the rare powers given it by the constitution: to legislate upon contracts, penal law, commercial and bill-of-exchange law, and judicial procedure, and to regulate the reciprocal execution of judgements in civil affairs and requisitions.<sup>1</sup> By a number of statutes it determined the substance of the law for the whole of Germany,<sup>2</sup> by the *Gerichtsverfassungsgesetz* (Judicature Act) of January, 1877, it regulated the procedure of all courts and the minimum qualifications and status of judges, and, by other laws and orders, it arranged for the nation-wide validity of judgement rendered in any state court,<sup>3</sup> and mutual aid of the states to secure justice whether the court approached is in one's own state or in another. Further, it established the *Reichsgericht*, as a Supreme Court of Appeal from the highest state courts, and, in a few cases, as a court of first and last instance.<sup>4</sup>

We saw that in America the states were able to admit the authority of a supreme court, federally appointed, to settle controversies between states. Not so in Germany. The authority here called in was

<sup>1</sup> Art. IV, 11 and 13; and see Laband, *Reichstaatsrecht*, pp. 338 ff.

<sup>2</sup> *Criminal Code*, February, 1876; *Civil Code*, August, 1896; *Commercial Code*, 1897.

<sup>3</sup> Laband, *op. cit.*, p. 341. Judgements have been rendered executable all over the area of the Reich, as well as the necessary judicial injunctions and commands, to secure justice in pending actions.

<sup>4</sup> A little more detail will make clear how far the Empire exerted this unifying authority. The *Reichsgericht* was established in 1879, with full competence over all civic disputes and penal matters. In an access of particularistic zeal, its seat was placed at Leipzig. It heard the appeals from the Supreme State Courts (the *Oberlandesgerichte*) whether the decisions appealed against were of first or second instance. Final decisions were revisable only if an imperial law had been infringed by them. The *Reichsgericht* also decided controversies over the competence of local courts. It was the sole court for high treason where this was directed against the Kaiser or Empire, though attacking a state in the first place, and for cases of the betrayal of military secrets. It had appellate jurisdiction from the consular courts, and the Imperial Patent Office.\*

The Courts immediately below the *Reichsgericht*, the *Oberlandesgerichte*, were the supreme courts of the states, and they stood at the head of a state organization of courts comprising at the bottom the *Amtsgerichte*, and higher up the *Landesgerichte*. Their civil, criminal and bankruptcy proceedings were regulated by detailed Imperial Codes. Costs and the various sorts of fees were imperially regulated. Though,

\* The Imperial Patent Office, the Imperial Office for Domicile [(*Reichsamt für das Heimatwesen*), *Gerichtsverfassungsgesetz*, January, 1877], the Supreme Office for Marine Affairs [(*Oberseeamt*), *Civilprozessordnung*, January, 1877] and the *Rayonkommission* (*Strafprozessordnung*, Feb., 1877), the Imperial Office of Insurance [(*Reichsversicherungsamt*), *Konkursordnung*, Feb., 1877] and the supervisory office for Private Insurance [(*Aufsichtsamt für Privatversicherungen*)] were special courts.

significantly the Bundesrat,<sup>1</sup> and its methods were those already analysed in regard to the superintending power of the Reich over the states.

### FINANCE

‘Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.’<sup>2</sup>

The strength exercisable by a taxing authority is so great, indeed, that German political scientists have summed it up in a dictum widely current: ‘The state is only the sum of its financial capacities, and financial authority constitutes the faithful reflection of political sovereignty.’<sup>3</sup> An analysis of Federal systems of finance shows that this is true, and, we add, that the sovereignty which is being reflected is not sovereignty as it appears from the constitution or the intentions of the founders of the system, but as it exhibits itself in the working. Indeed, the financial is an integral element of political sovereignty, an indispensable ingredient, and to divine its nature is to discover the true distribution of political supremacy in a federation.

We can imagine a large variety of methods of distributing the taxing power between the states and the Federal authority,<sup>4</sup> but these are all applications of three basic methods: (a) the states and the Federation may each have their separate sources, insulated and exclusive, or concurrent; (b) the Federation may levy all taxes and assign some to the states; or (c) the states may levy all taxes and assign a portion to the Federation. But any careful scrutiny of these alternatives will reveal possibilities of variation, which do actually obtain. For instance, in the third alternative, the states may levy all taxes, and yet the Federation may have the power to decide, freely, how much it wishes to spend and may then make requisitions

within the regulations, the states were free to create variations; these were so detailed as to render impossible any serious divergence of practice. Moreover, the *Reichsgericht* acted always as a strong unifying factor.\*

<sup>1</sup> Sect. 13, Art. LXXVI.

<sup>2</sup> Hamilton, *Federalist*, XXX.

<sup>3</sup> Hensel, *Finanzausgleich im Bundesstaat* (Berlin, 1922), p. 12.

<sup>4</sup> Hensel, *op. cit.*, gives a graphic representation of the possibilities.

\* It was possible by the Introductory Law to the Law of Judicial Procedure (Sect. 8, 1) for any state (save Saxony) to withdraw from the jurisdiction of the *Reichsgericht*, for that law permitted any State with more than one *Oberlandesgericht* to create an *Oberstes Landgericht*, a State Supreme Court, to which might be referred all civil cases falling within the appellate and revisional jurisdiction of the Imperial Court. All the States excepting Bavaria and Prussia either could not afford more than one *Oberlandesgericht* or found it undesirable. Prussia would not make use of its right. But Bavaria established such a Supreme Court. However, this Court lost much of its power after 1896 when the Introduction to the Civil Code transferred all final appeal cases based on the Civil Code to the *Reichsgericht*.

to be met by the states. In alternative (b) the assignments to the states may be for purposes specified by the Federation and may involve Federal supervision of expenditure. It will readily be seen that the actual method adopted has political effects probably never suspected, let alone intended, by the founders of the constitution. In the description which follows we cannot insist upon this truth in every particular, but it should be constantly present in the mind.

The U.S.A. I am astonished at the ease with which the distribution of financial power was accomplished in the American Federation. Indeed, I have scoured the records of the convention for the signs of shock and can find none. The explanation can only be sought in this, that the founders were so heartily sick of the feebleness of the Confederation, which could, in fact, be reduced to financial causes, that that solution, at least, was unthinkable. For in the Confederation the central government had the authority to call for any sums necessary, in their view, to the expenditure of the United States. These sums were, however, not obtainable by direct taxation of individual citizens; but requisitions had to be made to the state governments, and each of these paid towards the common fund a quota proportionate to the value of all land in that state.<sup>1</sup>

The result of that system was deplorable. The states paid, some not at all, some below the proper amount, and others not to time.<sup>2</sup> The Confederal authority was badly water-logged. For, indeed, the cardinal question remained permanently unanswered, even unanswerable: how could the confederal authority execute judgement without breaking up the federation? If, then, the Union was to be made more perfect, its powers extended, and its life to be permanent, it must have the pecuniary means. The Federation must be free of the states in regard to its revenues. The founders were bold enough to accept this conclusion and decided that certain revenues would vest in the Federation, and bold enough to give the Federal authority almost unfettered discretion to tax; leaving it an unuttered but clear enough principle, that the states might, with the exception of certain revenues exclusive to the Federation, range over the same sources for their own purposes. There is evidence that some—we do not know how many—people were antagonistic to this arrangement, for

<sup>1</sup> Art. VIII: 'All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land, granted to or surveyed for any person, as such land, and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint.'

<sup>2</sup> 'The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled.'

<sup>3</sup> Cf. the discussion of State activity, general conclusions, No. III.

Hamilton takes special pains to answer them in several numbers of the *Federalist*.<sup>1</sup>

Congress obtained the power to lay and collect taxes, duties, imports and excises to pay the debts and provide for the common defence and welfare of the United States.<sup>2</sup> There were but few limitations on this power. One was that the taxes 'must be uniform throughout the United States'; another, that 'No tax or duty shall be laid on articles exported from any state'<sup>3</sup>; a third, that 'No capitation or other direct tax shall be laid, unless in proportion to the census'<sup>4</sup>: i.e. in proportion to the population of the states. Within this scheme the states may lay and collect any taxes except those forbidden by the constitution. The exclusions are: 'that no state shall, *without the consent of Congress*, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,'<sup>5</sup> whatever revenue being thus produced to accrue to the United States Treasury; and that 'no state shall, without the consent of Congress, lay any duty on tonnage'.<sup>6</sup>

Thus the Federation and the states were put upon an independent financial footing. They may take from the same source, with certain prohibitions upon the states, but they act independently and seek revenues for themselves, and not with the intention or the duty of assigning to the other authority for its use.

The limitations and the exclusions deserve a little more attention. 'Uniformity' in taxation was a little uncertain until the decision in *Knowlton v. Moore*.<sup>7</sup> Then it was held that a tax on legacies, progressive according to amount, and varying with the closeness of relationship, was constitutional, because uniformity meant not *intrinsic*, as between one individual and another, but geographical, that is, the rates must apply equally *in every part of the Union*. This construction was founded upon the history of proceedings in the Confederate Congress and the Constitution Convention, in which it was shown that

<sup>1</sup> The objections were these, that (1) only tariff duties should be assigned to the Federation, all other sources of revenue being reserved to the states; (2) the Federation would be in a position to mulct the revenues of the states to such an extent as to make state government impossible, but they did not prevail. To these objections Hamilton answered (1) that tariff duties might not provide enough revenue to meet the proper expenditure of the Union and, (his favourite argument), as the means must be proportionate to the end, the central authority must not be unduly restricted, for they who make constitutions must endow them with a capacity to meet future needs; and (2) as regards the possibility of Federal usurpation by financial means, 'all observations founded upon the danger of usurpation ought to be referred to the composition and structure of the government, not to the nature or extent of its powers. . . . It should not be forgotten that a disposition in the state governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the state governments. . . . Everything beyond this must be left to the prudence and firmness of the people'.—*Federalist*, XXXI.

<sup>2</sup> Art. I, Sect. VIII.

<sup>3</sup> Art. I, Sect. X, para. 2.

<sup>4</sup> Art. I, Sect. IX, para. 5.

<sup>5</sup> *Ibid.*, para. 3.

<sup>6</sup> *Ibid.*, para. 4.

<sup>7</sup> (1900), 178 U.S. 41.

the deepest-rooted fear of the states regarding Federal finance was 'the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state'. This is a consequence of federalism, in which states disparate and separate join together on terms that safeguard their equality.

The power to raise revenue by tariffs was restricted, as we have seen by the prohibition of taxes on articles exported. Whether Congress is forbidden to tax exports to foreign countries only, or exports from the states to other states in the Union, is a highly disputed point.<sup>1</sup> The states may not tax articles from another state. The motives for these prohibitions are quite plain from the debates in the Convention. Almost all states, but especially the states producing crops, the 'staple states',<sup>2</sup> were afraid that the seaboard and commercial states would penalize them by taxing their imports. Further, the Southern states, especially South Carolina, were mortally afraid that the products of slave labour would be federally taxed.<sup>3</sup> *Slaves* was written over the whole debate.

One point yet remains for discussion. Direct taxes were not to be levied by Congress unless in proportion to population. Into the vexed question of what is a direct tax, we need not enter; the long contradictory history of this term before the Courts would take us too far afield.<sup>4</sup> As time went by, the Federation found that indirect taxes, duties on imports, and excise, could only suffice to cover its expenditure if these were raised to levels generally uneconomic and unjustly discriminatory between industries, this often meaning between different Sections of the country. It was seen that need for revenue ought seldom, if ever, to be the principal determinant of industrial, commercial and agricultural policy. General justice requires a wide variety of taxes. But fear of discrimination and destruction had prompted the safeguarding formula: 'in proportion to population'. This was a very inconvenient basis of assessment, and it was finally repealed by the 16th Amendment (1913), which

<sup>1</sup> *Dooley v. United States* (1901), 182 U.S. 222.

<sup>2</sup> *Doc. Hist.*, III, 542.

<sup>3</sup> J. G. Van Deusen, *op. cit.*

<sup>4</sup> Cf. W. W. Willoughby, *The Constitutional Law of the United States*, 2nd Ed., New York, 1929, II, 687: 'The decision of the Supreme Court in each of these cases in which this point has been raised has supplied an authoritative determination only as to the direct or indirect character of the particular taxes in question. From these decisions, however, a judicial definition of direct taxes may be drawn which makes the term include all taxes levied upon property, real or personal, or upon the income derived from such property, and all capitation or poll taxes. A review of the cases will show that only within recent years has the court been willing to adopt this comprehensive definition, and, when it finally did so, the decision came as a surprise to very many of the lawyers and courts of the country.'

In the case *Evans v. Gore* (1920), 253 U.S. 245, it was decided that the salaries of Judges were exempt from income tax; the basis of the decision was the constitutional provision that the compensation of judges 'shall not be diminished during their continuance in office' (Art. I, Sect. 1).

gave Congress the 'power to lay and collect taxes on incomes, from whatever source levied, without apportionment among the several states, without regard to any census or enumeration'.<sup>1</sup>

Regarded as an expedient in federal government this distribution of financial powers has worked fairly smoothly. But, three questions proved disturbing. The first arose when Maryland taxed the note issue of the U.S. Bank. Were federal agencies to be taxable by a state, considering that the power to tax in this case was intended to destroy, and could in future be used to destroy? This question was answered by the Supreme Court in *McCulloch v. Maryland*: an instrument of the United States is not subject to diminution or control by any state. The second question was, could Congressional taxes be used for *regulating* political behaviour, and not primarily for revenue? The Supreme Court answered, Congress may regulate by its powers of regulation as given in the constitution—e.g. to provide a currency for the whole country,<sup>2</sup> to regulate commerce,<sup>3</sup>—and the *means* of regulation may there be a tax.<sup>4</sup> Are the courts, then, to be the judges of legislative intention? When Congress taxed oleo-margarine, made to look like butter, the courts denied the duty of looking to legislative intention (which was to protect dairy farmers), and held that an excise duty on margarine was quite within the taxing power.<sup>5</sup> So also a tax on cotton futures.<sup>6</sup> Yet this reasoning was explicitly rejected by the court in the taxation of the products of child labour: the intention, it said, was not to obtain revenue, and the power under the Commerce Clause did not include the regulation of child labour; and it was pointed out that, 'Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the power of Congress, and completely wipe out the sovereignty of the states'.<sup>7</sup> We see here, then, how fully the taxing power is pervaded by that essence of a state called sovereignty.

<sup>1</sup> An amendment regarding taxes on incomes was reported in the Senate June, 1909, from the Committee on Finance. A subsequent attempt was made to add to it provisions similar to those of the 17th Amendment—and failed. The amendment was ratified by all the States except Connecticut, Florida, Pennsylvania, Rhode Island, Utah and Virginia.

<sup>2</sup> *Veazie Bank v. Fenno* (1869), 8 Wallace, 533, 549.

<sup>3</sup> *Head Money Cases* (1884), 112 U.S. 580, 595, 596.

<sup>4</sup> W. Thompson, *Federal Centralisation*, New York, 1923.

<sup>5</sup> *McCray v. United States* (1904), 195 U.S. 27.

<sup>6</sup> *Hubbard v. Lowe* (1915), 226 Fed. Rep. 131, 137.

<sup>7</sup> Chief Justice Taft said, in language of measured gravity: 'The good sought in unconstitutional legislation is an insidious feature because it leads citizens and

Finally, the tariff as a means of revenue. It has already been seen how difficult it is to distinguish the intention to obtain revenue from the intention to regulate. Until recent years the tariff was the main source of federal revenue, a source, indeed, so large, that the spending of it was always an onerous difficulty, and since the tariff is designed to protect and encourage some forms of economic activity, a burden falls upon those who must pay the tolls without receiving any corresponding benefit from them. The result, universally, is friction followed by an uneasy compromise. But in America the tariff has almost always been an important—sometimes the only—issue upon which Congressional and Presidential elections hinged.<sup>1</sup>

No country is exempt from this struggle between industries to maintain themselves at the expense of others, nor can any government be free from the necessity of directing the national energies into paths which seems to it, on broad domestic and international views, the best. Industrial and commercial associations cannot avoid penetrating into the lobbies and even the very forum of the legislatures and marching and counter-marching to Prime Ministers and Ministries of Commerce. But these things cause fewer difficulties in a small than a large state like America, where the interests are enormously large and as hostile as diverse. But now direct taxes are steadily increasing in proportion to the indirect.

Two difficulties are inherent in the financial system of the American Federation: the struggle between the State and Federation for possession of the conveniently-raised taxes; and the disputes between states for taxation rights over incomes and property where the taxpayer is citizen of one state and the source of income or property in another.<sup>2</sup>

**Germany.** The finance of the German Federation has been very different from that of America; and the reason is plain: we do not open our pockets to an authority in which we have small faith. Yet the constitutions of 1867 and 1871 showed astonishing liberality upon

legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half. Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions.'—*Bailey v. Drexel Furniture Co.*, 259 U.S. 20.

<sup>1</sup> South Carolina wove her first nullification and secessionist theories around her objections to the tariffs which were injuring her for the benefit of the manufactures and merchants of the North and East. After 1870 the agricultural West became a potent contestant of Eastern interests in the tariff. Cf. Chapters on Political Parties, *infra*.

<sup>2</sup> *Annals of the American Academy of Political Science* (January, 1927): *Federal v. State Jurisdiction*.

the part of the states. For this was what the constitution declared <sup>1</sup>: that the Federation should have four great fields of finance, (a) tariff duties, (b) consumption taxes, (c) the postal and telegraph services and (d) 'in so far as they cannot be provided for by those revenues, they (the common expenses) are, as long as Imperial taxes are not introduced, to be met by contributions from the single states of the Confederation, in proportion to their population', assessed by the Imperial Chancellor.

This is a very liberal grant: there are few limitations upon the objects of revenue, and none upon the amount which may be raised. The limitations upon the objects of revenue resulted from the bargain made with the South German states to secure their entrance into the Federation: Article 35, on the taxation of native spirits and beer in Bavaria, Württemberg, and Baden. Apart from this, the *sole right* in the taxation of salt, tobacco, beer, spirits, sugar, syrup and other beet products was vested in the Federal authority. And over the postal and telegraph service receipts, it was the exclusive authority, except in Bavaria and Württemberg.<sup>2</sup>

Confusion, however, reigned from the outset, for the Reichstag intervened, and across the constitution scribbled its own political principles, some to strengthen the Reich, others to give it an adequate control of the Budget. Firstly, the Reichstag which debated the Constitution, had considered the state contributions to be only a temporary expedient pending a full establishment of Reich taxes, which were thought of as indirect. The project of the constitution of 1871 had said (Arts. 4, 3, 2): 'Indirect taxes to be used for the purposes of the Reich are to be supervised and regulated by the Reich'. 'Indirect' was struck out, and the meaning of the phrase thus extended. At the same time there was added to Article 70 the clause: 'As long as the Reich taxes are not introduced.' The Reich was therefore not limited to indirect taxes. But whether it could ever raise them, and in what measure, was a political question depending for its answer upon the purposes it pursued and the strength of parties in the Reichstag and delegates in the Bundesrat. Although, in fact, direct taxes came to be laid by the Reich, State contributions remained until 1914 a proportion, if not the staple, of Imperial finance.

The clause, 'as far as the Reich cannot get its means otherwise it can levy contributions upon the states according to population,' was made by the States and the Reichstag the centre of gravity, and what had originally been considered as subsidiary and temporary, became paramount and permanent. Gradually, however, the Reich showed its strength and victoriously entered fields of finance which were long defended by the states.

<sup>1</sup> Art. LXX.<sup>2</sup> Arts. XXIX and LII.



That the resistance was strong is further shown by the history of the *Matrikularbeiträge*, the contributions by the states.<sup>1</sup> In 1879 Bismarck bought the power to raise a protectionist tariff from the Reichstag by conceding to it a control over the annual amounts to be raised for the benefit of the Reich. This was expressed in the Frankenstein Clause of the Tariff Law of 1879: 'Those proceeds of tariffs and the tobacco tax which in any year exceed a certain sum (130 million of marks) are to be assigned to the individual states of the Federation in proportion to population.'<sup>2</sup> This concession of Bismarck to the Centre Party could not but be made, for many political currents swept him towards it: the particularism of the Centre Party (very strong in Bavaria) and the Conservatives, Reichstag control of the purse, and claims for protectionist tariffs. The Reichstag obtained the annual power of stating the *fixed sum* which should go to the Reich, above which assignments were to be made to the states. Now more than ever the Reich and the states became rivals, not always in a good humour with each other, while the states had secured an equitable claim on the Reich.<sup>3</sup> A sum of money, as a surplus, over the fixed amount, was to be assigned to them; the Reich would still be in a deficit, and if the assignments annually made to the states were large in proportion to the total obtained from tariff duties and other taxes, it would still need contributions from the states.

The political result of this development was a decided swing away from Unitarism. For the constitutional clauses had given the Reich

<sup>1</sup> Cf. Frankenstein's speech, 9 July 1879.

<sup>2</sup> H. Robolsky, *Der Deutsche Reichstag*, Berlin, 1893, p. 449.

<sup>3</sup> See Reichstag, *Sten. Ber.* 77 *Sitzung*, pp. 2178-86; and for an account of the negotiations leading up to the arrangement, Oncken, *Bennigsen*, II, 412-19: 'For years this (the independence of Imperial Revenue) has been a set policy, setting out from the idea that it is not a matter of indifference in a Federal state whether the Imperial Government is itself endowed with sources of revenue which flow for it alone, or whether they are referred for their constitutional claims to the States who are to raise any deficiencies,—to use a phrase of the Imperial Chancellor, "to beg it at the doors of the individual States while the Reich holds the richly flowing source of indirect taxes locked up". The financial dependence of the Reich upon the States has till now been something merely occasional, so long as the source of income did not yield the necessary amount to cover the aggregate expenditure. This situation could be amended automatically given economically favourable circumstances, in particular, when the indirect taxes and duties themselves rendered a larger revenue and made possible a complete covering of expenditure. . . . Instead, now, of eliminating the State contributions, Article 7 fixes these permanently for all time, and they therefore become a normal, integral constituent part of the Reich constitution, whereas for long they have been but a provisional expedient. . . . I am afraid that the attitude of the delegates in the Bundesrat to the Imperial authority and the Government to the individual States will be altered in such a way that the most difficult disturbances will result. . . . Now in the enthusiasm of our world-historical attainments to which the German Empire owes its creation, the creators of the Reich might at least consider the German Empire strong enough to make this sacrifice to particularism. But will the Imperial Government always be as strong as to-day? History teaches that the security of Federal States rests upon this, that the Federal authority is sufficiently equipped in military administration and finance.'

almost *carte blanche*, upon which it could write not only its demands for almost all kinds of taxes, indirect and direct, but also as high a sum as it chose to ask from the states in the form of deficiency contributions. But that which was the exception became the rule, and the Empire became more and more, not less and less, bound to the deficiency contribution system, because its revenue from the staple indirect duties was limited to 130 million marks.<sup>1</sup> As Laband has said, the duties did not, as according to the constitutions they should have done, flow into the Imperial Treasury, they flowed *through* it.<sup>2</sup> Nor was this all. Thenceforward the aim of the states was to secure as much from the Reich in return for as little contributions as possible. It is, indeed, astonishing how quickly and easily men can persuade themselves of the equity of their claims. But to the states this proved no unmixed blessing, for the amounts available from the Federal surplus were unpredictably variable. Yet until the middle 'nineties they were happy, for from 1883 until 1898 surpluses were available, and no deficiency contributions had to be raised except they could be partly covered by Federal assignments. When, however, in 1893 and 1894 uncovered contributions had to be paid, the states attempted to get the contribution 'bound' or limited to a fixed sum in proportion to the amounts payable by the Reich. As, however, the Reich expenses were increasing, the states were obliged to offer ever larger amounts, providing these could be fixed. The Reichstag now refused to entertain such limitations, since these would be inimical to its 'power of the purse'; and it was boldly asked, why should not the states pay for the Reich? Small expedients were tried to avoid the bewildering results of payment and counter-payment, and cross-accounting of amounts payable at different dates: the result was ever greater confusion.<sup>3</sup>

Thus the Frankenstein Clause had in fact altered the constitution. It now remained to re-amend the written constitution to fit the unexpected facts. This was accomplished by the laws of May, 1904 and June, 1906. By the Act of 1904,<sup>4</sup> Article 70 was amended. The clause 'As long as Reich taxes are not introduced' was deleted, and the Article, as amended, read: 'To cover all common expenditure there shall serve first the common revenues derived from tariff duties and general taxes (in place of the deleted clause); from railways, Posts and Telegraphs and other branches of public administration. In so far as the expenditure is not covered by these revenues, they are to be augmented by contributions from the individual states according to their population.' Thus the Deficiency Contribution

<sup>1</sup> In 1881, 1894, and 1887 the Reich Stamp Duties and Brandy Duties were also subjected to the surplus assignment system.

<sup>2</sup> *Geschichtliche Entwicklung, Jahrbuch des Öff. Rechts*, I, 44.

<sup>3</sup> Laband, *Deutsche Juristische Zeitung*, 1902, pp. 1 ff.

<sup>4</sup> R. G. Bl. 169 (14 May 1904).

system was made formally a permanent part of the Imperial system.<sup>1</sup>

Hensel concludes that 'political sovereignty and financial sovereignty did not correspond in the German Empire between 1871 and 1914'. But this surely is to give political sovereignty a meaning derived not from the facts of political life, but from a written constitution, which, for some years (while the French indemnity was being spent), was financially unimportant, and then, becoming of practical importance, was promptly shelved. The same author observes that in every other sphere of German political life the unitary element developed and prevailed, and we have seen from other sections of this inquiry that that is true—and yet, 'between the Reich and the states there set in an ignoble higgling and bartering over every pfennig'.<sup>2</sup> What is the explanation? To me it is clear: the states, like every other group of human beings, were ever ready to enjoy the benefits bestowed by common laws and administration, but disliked paying. It was, and is, to be expected, that where the means are held by one authority, and the end sought by another (even representative of the former), a gulf will occur between the will to obtain benefits and the will to pay for them. For in the pursuit of political good, men seek to receive the utmost and sacrifice the least; and the art of the statesman, as distinct from the politician, consists in making men realize that there can be no acquisition without some form of payment, and that in the long run the means must be proportionate in quantity, quality and organization to the object desired.<sup>3</sup> Until 1919 political sovereignty was moulded by Particularism, and inevitably, finance received its impress.

(f) Stipulations relating to the form of State Governments. This is explained later.

#### CONSTITUTIONAL AMENDMENTS

(g) In Federations, special conditions are attached to the alteration of the Constitution. Thus in America, besides the unusual difficulty of amendment, no state can be deprived of its representation in the Senate without its consent.<sup>4</sup> In Germany, under the old Constitution, fourteen votes in the Bundesrat could veto an amendment; and in Switzerland and Australia a majority of the cantons (in Australia, states), as well as of the voters in general, are required for a valid constitutional amendment.<sup>5</sup>

#### THE THEORY OF FEDERALISM AND SECESSION

What is Federalism? The only short answer that can be given is that it means 'association'. But we know that association among

<sup>1</sup> Hensel, *op. cit.*, pp. 139 ff. and Waldecker, *Reichseinheit*, pp. 61 ff.

<sup>2</sup> Hensel, *op. cit.*, p. 143.

<sup>3</sup> This should be related to the General Conclusion on State Activity in Chap. IV, *supra*.

<sup>4</sup> Art. 5.

<sup>5</sup> Switzerland, Art. 121; Australia, Chap. VIII.

groups of men may take place on an infinite variety of terms. There is co-ordination, super-ordination, graduated subordination, permanent or temporary arrangements, easy or difficult withdrawal or no withdrawal at all, partial or complete partnership, that which originates in the search for the individual advantage as conceived by the separate partners and that which is compelled by a common need and loyalty, and which establishes a community of thought and behaviour not selfishly regardful of the actor's own good. And all these, which leap to the mind, are susceptible of varied combination with each other.

The time, the men and the environment produce the impulse to association among states, and as men, times and environments differ, we know that the association must in each case be different. Only from a distance and outwardly are Federations similar; and to speak of the essential characteristics of their form is, I am afraid, rather misleading.

**The U.S.A.** The founders of the American Constitution did not know exactly where they were going. They knew only, as all who desire a federation know, that they wanted a form of government somewhere intermediate between independence and complete absorption in a new state. There was an insurmountable difficulty in finding the term which would exactly fit what they desired and what they believed they had obtained—'confederal', 'foederal', 'a compound republic', a 'confederate republic', a 'more perfect union', 'a partial union or consolidation', 'a consolidated government'. Again, consider Madison's summary of the nature of the constitution:

'The proposed constitution, therefore, is, in strictness, neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national, in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.'<sup>1</sup>

This same Madison argued at one time that the states should be looked upon as counties in a unitary state, and, in 1793, composing the Kentucky Resolutions and the Report thereon, denounced the usurpation of the Federal government.

Hidden in the obscurities of language were the intentions of the founders, and those intentions amounted to this: that the *states* were to be retained as bodies politic while by their side a new one, the United States, was to be created. We can find in the records of the Convention, and the Debates in the State Conventions, more precise indications of what individuals expected the federal relationship to be, but hardly any two expected the same thing. The federal relationship was tentative; its meaning was to be known only later, as the constitution responded to concrete needs.

<sup>1</sup> *Federalist*, XXXIX.

'An entire consolidation of the states into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.'<sup>1</sup>

The crucial question speedily arose in practice: If a dispute arises as to the extent of the power of the Union, and the answer thereto be given in the prescribed constitutional form, and some states consider this a wrong interpretation of the constitution—can they nullify the act, can they, in the last resort, secede, *constitutionally*? Or, in other words, is it constitutional to nullify and secede? It might be deemed constitutional, if it were admitted that the states had associated as completely sovereign and independent entities on these terms. And, indeed, this argument has been used, and has had tremendous political effect upon the fortunes of the Union. What standing had a state if it assumed that it was entitled to refuse obedience? If the answer were that the state had this right, *constitutionally*, then it is obvious, that the nation was established upon a flimsy basis—for the acts of the Federal authority could at any time be nullified and it would be placed between the alternatives of impotence or war. Or was there no duty but to accept the constitution as declared by the instruments acting quite constitutionally as regards form, but doubtfully considering the vagueness of the constitution and the possible varieties of interpretation open to all the authorities—Congress, the President, the Supreme Court—vested with interpretation? Who constitutionally, (which is identical here with *peacefully*) was the ultimate arbiter in a dispute?

Until the Civil War the notion of dual sovereignty—a division of authority between States and Federation—prevailed, and in the background was the hazy idea that the ultimate arbiter was the People—that is, the Majority. But, then, who was to judge of the *necessity* and *propriety* of the laws executing the powers of the Union? There was no unanimous answer. Were the ultimate arbiters the People, in their states as collective and separate entities, or the People conceived as an aggregation all over the territory, the state boundaries being conceived as non-existent? Under the first rule, the states could claim a right of self-preservation against the Federation, against *other states*, read this into the constitution, and proceed to nullify

<sup>1</sup> *Federalist*, XXXI (Hamilton).

<sup>2</sup> 'I answer . . . that the national government like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the Federal government should overpass the just bounds of its authority, and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution as the exigency may suggest and prudence justify' (Hamilton, *Federalist* XXXIII).

constitutionally; while, under the second rule, their inhabitants could be properly outvoted, and right would be on the side of the majority.

There may be governmental authorities acting together side by side, and they may be said each to be supreme or sovereign in their own sphere: but the vital question relating to sovereignty is, precisely, which set of men, acting under what forms, have the authority to decide that sphere? Many argued that the Union rested upon a compact between the states—these entities being the parties thereto. The language of the Kentucky and Virginia Resolutions is clear<sup>1</sup>: 'They (the states) entered into a compact.' Again: 'It views the powers of the Federal government as resulting from the compact to *which the states are parties*.' Further, Jefferson: 'To this compact . . . each state acceded as a state, and is an integral party.'<sup>2</sup> Whenever the United States, as during the French Revolution, faced an important political issue, the Federal system was subjected to strain, the states most interested crying 'Compact' and 'State Sovereignty'! The Hartford Convention of 1814, protesting against the War with Great Britain, so destructive to New England trade and shipping, declared that

'in cases of deliberate, dangerous, and palpable infractions of the constitution affecting the sovereignty of a state and liberties of the people, it is not only the right, but the duty of such a state to interpose its authority for their protection, in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of the judicial tribunals, or too pressing to admit of the delay incident to their forms, *states which have no common umpire* must be their own judges and execute their own decisions.'<sup>3</sup>

The question, shall all issues be settled within the Constitution, or may some be settled outside it, was put with ever sharper point as the manufacturing and financial interests of the North and East overwhelmed Southern interests in the Tariffs. Out of that controversy grew the doctrines of Nullification and later of Secession, on the one hand, and by reaction, the paramountcy of the constitution, *nationally* interpreted, on the other—the struggle ultimately being over the limits of Majority Rule, and being 'settled' by the Civil War. To this we return presently.

The controversy also revolved around the word 'compact'. If there was a compact, what was its nature, and between whom was the

<sup>1</sup> Cited Macdonald, *Select Documents*, I. Cf. also McLaughlin, *Social Compact and the Constitution*, in *American Historical Review*, V, 467-90.

<sup>2</sup> Once more: Madison, 1800 (Report): 'The states being parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated: and consequently, that, as the parties to it, they must themselves decide in the last resort such questions as may be of sufficient magnitude to require their interposition.'

<sup>3</sup> Cited Macdonald, *op. cit.*, pp. 293-302.

'compact' made? On the one side, that of Jefferson, and even of Madison (who once stoutly defended the contrary proposition), it was urged that the states were parties: and since they were parties, the system depended upon their assent and, moreover, they could withdraw at their own discretion. This was the logical conclusion drawn by those who saw in the United States a system composed of sovereign states.

The answer to such doctrines was twofold. Hamilton and others argued that the states were not the creative units in the Federation, but the units were the People, the states were but agents of the people; and, secondly, whatever the nature of the compactors, there was no legitimate secession except with the consent of all the partners thereto.<sup>1</sup>

The latter argument was best put<sup>2</sup> by Judge Story. He denies the destructibility of the compact (a) unless all partners agree to it, and (b) because of the vital interests involved in the continuance of a peaceable community.

Is the instrument of a government 'to be construed as a continuing contract after its adoption'? If so, then, where is the permanence or security of the government? 'The existence of the government and its peace and its vital interests will, under such circumstances, be at the mercy and even at the caprice of a single individual. The paramount interest is peace: 'The only redress for any such infringements, and the only guarantee of individual rights and property, are understood to consist in the peaceable appeal to the proper tribunals constituted by the government for such purposes; or if these should fail, by the ultimate appeal to the good sense and integrity and justice of the majority of the people.' In the last resort, the majority of the People must prevail; never can a minority receive constitutional sanction for disobedience. Disobedience is outlawed.

Does this not sound strangely like the rejection of the claims of minorities anywhere, even in Unitary States? The essence is, in fact, the same: all groups, in a minority, have accepted or approached such a position. It is a minority doctrine; and it is countered by

<sup>1</sup> Hamilton, in the Convention, asked: 'But as the states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more absurd than to sacrifice the former to the latter (*Documentary History*, III, 242). Cf. also Marshall, in *McCulloch v. Maryland*: 'The government proceeds directly from the people; is "ordained and established" in the name of the people. . . . The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept it or reject it, and their act was final. It required not the affirmation, and could not be negated by the State Government. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties. . . . The Government of the Union, then, is emphatically and truly a government of the people, in form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit.' Cf. Corwin, *Judicial Review*, pp. 81 ff.

<sup>2</sup> *Commentaries*, Bk. IV, Chap. III.

the insistence that, however urgent the claim to resist and secede, the presumption is, and must be, that the whole corporation must not be disobeyed by any of its parts. In America it happened that the dissatisfied classes were able to appeal in the name of the 'rights of the states', (which, however, were never unanimous). It is akin to the refusal of even the most generous lovers of liberty to sanction, constitutionally, a right of revolution.

The debate between Hayne, Webster and Calhoun reformulated the questions: (1) whether the constitution was a compact between states, or made by the people to include the states and the Federation in a scheme limiting both to certain rules of behaviour?; (2) if the terms were uncertain, in whom was the right of judgement vested, the Federal organs, and if so, which?; (3) if the actual terms were the cause of social uneasiness, how were powers to be redistributed—by the process of amendment in the constitution or . . . ?; (4) was secession legally possible? <sup>1</sup>

Webster answered the first question by saying that the people were the sovereign body, paramount over States and Federation. 'We are all agents of the supreme power, the people.' Hayne maintained that the Union had begun with independent sovereign states, who had, as states, voluntarily given certain powers, but not their sovereignty, to the Federal authority. Hayne therefore argued as though the issue were one between the opinion of the individual states and the Federal government: whereas the real issues, as Webster pointed out, were those between the states and the Constitution. In Webster's view the constitution was sovereign over states and Federal government: in Hayne's it was as though the constitution were not, but that a daily questioning and re-arrangement were permissible, on the general grounds that the states were sovereign and were the proper judges of the extent to which the Federal Authority passed beyond the written document.

Webster's strongest point and Hayne's weakest lay in the answer to Webster's question: if one state could nullify and, perhaps, secede, so could all. Then the Union was clearly like a rope of sand:

'The General Government, then, is the servant of four and twenty masters, of different wills and different purposes, and yet bound to obey all. The sentiment to which I have referred propounds that state sovereignty is only to be controlled by its own "feeling of justice"; that is to say, it is not to be controlled at all: for one who is to follow his own feelings is under no legal control. It so happens that, at the very moment when South Carolina resolves that the tariff laws are unconstitutional, Pennsylvania and Kentucky resolve exactly the reverse. They hold those laws to be both highly proper and strictly constitutional. And now, sir, how does the honourable member propose to deal with this case? . . . Are we not thrown back again, precisely upon the old confederation?'

<sup>1</sup> Cf. for the full texts of the Debates, Macdonald, *Select Documents*, II.



Hayne's answer was that judgement should be rendered by three-quarters of the states. In other words, not a majority, but a *qualified* majority. The importance of this we shall explain later. He believed that if foreign powers could agree, so could friendly states.

Now, both Webster and Hayne had some common ground, in that both were prepared to accept the decision of the Constitution or Compact if its terms were *unmistakable*. Their roads parted most abruptly where a superior was required to judge in uncertain matters. Webster was confident that the constitution had provided for this :

'The very chief end, the main design for which the whole constitution was framed and adopted was, to establish government that should not be obliged to act through state agency, or depend upon state opinion and state discretion. . . . To whom lies the last appeal? This, the constitution itself decides also, by declaring "that the judicial power shall extend to all cases arising under the constitution and laws of the United States." These provisions cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a constitution; without them, it is a confederacy.'

Hayne countered by the argument that the Supreme Court was a Federal instrument, that the Federation was a party to the dispute, and that it was not good law that a party should be its own judge! What he omitted, and this is the greatest of his fallacies, was the fact that the court was a creature of the constitution for judging all parties alike; that it was an arbiter, not a party.

The truth is that Hayne, like his successor Calhoun, was dissatisfied with the checks upon the Federal authority set up by the Constitution. Webster considered that they were enough for the purpose he had in view—the words of the constitution, frequent elections, the judicial power, and the amending process. But Hayne denied that a Court could judge sovereigns, and obviously did not consider the other safeguards sufficient.

Could a state legally secede? According to Hayne's argument, Yes! although he did not expressly state that conclusion. Webster stated it for him, but denied that secession would be legal. It would be revolution.

Calhoun displayed Hayne's thesis to its greatest advantage in his *Dissertation on Government*, and short treatise on the *Government of the U.S.A.*<sup>1</sup> Calhoun begins very artlessly. Government is necessary to man to prevent anarchy. Government, however, has itself the tendency to go beyond its necessary powers, and become tyranny. Hence a constitution is required to maintain the proper balance between the individual and the social interests of man. An *organism*, or constitution, must be found, which by 'its own interior structure', will combat the tendency to abuse of power. Now this is properly accomplished, in the first place, by the right of suffrage—that is, by the

<sup>1</sup> 1853 (published: probably written 1848–9).

majority principle. Is that enough? *It is not*, because men's interests are not the same, and Calhoun later presses the issue beyond the mere fact of a social diversity of interests, to the natural inequality of men.

This is the very centre of Calhoun's theory: that the majority principle does not justly allow of the due expression of individual, group, and local diversities. For men, interests, 'portions' of a country are not equal: they are diverse, and likely to oppress each other. The larger the territory under a single Government, the more diverse its parts, the greater the necessity for a Constitution which gives each of the parts a veto upon actions affecting its vital concerns. Therefore, no ordinary majority system, but a *concurrent* majority system, and in the end nullification and secession.

It is no use relying upon the terms of a written constitution without such safeguards, for the majority can always interpret the terms as they will. Nor is the separation of powers a guarantee, for the majority will dominate all the powers. One could, of course, make each separate power the organ of distinct interests or 'portions' of the community; and clothe each with a negative on the others. But the effect of this would be to change the government from the numerical into the *concurrent majority*; and though with difficulty, this will work, because government *must go on*, and therefore the necessary compromises thereto will certainly be made. To prove that this is a practicable system, Calhoun pretends to show that the jury system reposes, successfully, upon the unanimity of any twelve diverse persons, and how Poland rose to greatness and glory in the period of the *plenum veto* by every Estate of the Kingdom.

The intention and the import of this philosophy is plain. It becomes plainer still when we add to it that of the *Discourse on the Constitution and Government of the United States*, which denied that a single Government including all the states existed, and asserted that the several state governments and the Federal authority were co-ordinate governments, properly immune, as sovereign, from suit before the Supreme Court. The proper arbiter is the amending process. It—the three-quarter majority—was the creator of the system; it is, in its modified form, its preserver.

'It is, when properly understood, the *vis medicatrix* of the system—its great repairing, healing, and conservative power; intended to remedy its disorders, in whatever cause or causes originating; whether in the original error or defects of the constitution itself, or the operation of time and change of circumstances, or in *conflicts between its parts, including those between the co-ordinate governments*. By it alone can the equilibrium of the various powers and the divisions of the system be preserved; as by it alone, can the stronger be prevented from encroaching on, and finally absorbing, the weaker.'

It is properly to be called in 'in case of a disputed power, whether it be between the federal government and one of its co-ordinates,

or between the former and an interposing state, by declaring, authoritatively, what is the constitution'. Moreover, the Federal Authority, as the claimant to exercise power, is bound to make it good, and therefore call the process into action, before the power is practically assumed. If this is not done, if the power to extend and decide its competence is left as it is, without the remedy suggested, then the *Federal* was transformed into a *consolidated national government* against the intentions of the founders. If the Amendment were obtained, the state's negative would be overruled and it must acquiesce. If the action is, however, beyond the limits of the amending power, inconsistent with the constitution and its established ends, or with the nature of the system, the state is not bound to acquiesce. 'It may choose whether it will, or whether it will not secede from the Union. One or the other course it must take. To refuse acquiescence would be tantamount to secession; and place it as entirely in the relation of a foreign state to the other states, as would a positive act of secession. . . . All this results, necessarily, from the nature of a compact between sovereign parties.'<sup>1</sup>

We have seen how difficult is amendment of the United States constitution, and Calhoun and his friends were, therefore, asking that a very potent engine for the preservation of minority (State) rights be reserved to them, on pain of nullification and secession. The fundamental urge in the doctrine was the desire to preserve the civilization of the South against Northern attacks. At the origin of the constitution, said Calhoun, dissension was feared as between the large and the small states, hence appropriate safeguards were created. These safeguards, however, were certainly not appropriate to the present dissensions, for 'the conflict is between the two great sections, which are so strongly distinguished by their institutions, geographical character, productions and pursuits'. Had this been foreseen proper arrangements would have been made, or alternatively, the Southern Section of the confederacy would never have agreed to the constitution.

Just before the Civil War, however, the Court and Federal government began to be seriously challenged both in the theories we have discussed, in the Congressional debates revolving around the Fugitive Slave Law, and even in the resistance of certain states.<sup>2</sup> First the North challenged the Federal Authority; then, upon Lincoln's election, the South. The Union blundered, unavoidably towards War: for the issues were too vital to admit of a debatable ground between sovereign State or sovereign Union.

One by one state conventions were summoned in the South where ordinances of secession were passed. It is interesting to observe that by this time the South was the supporter of the Supreme Court, the

<sup>1</sup> *Disquisition*, p. 300.

<sup>2</sup> Cf. Warren, *Supreme Court*, Vol. II, Chap. 25.

North its opponent. In 1861 the South formed the 'Confederate States of America'.

We are interested only in the constitutional position of the Confederates, of Lincoln, and the juridical results of the War. First, each state ordained the repeal of their ratification of the Constitution of 1788, together with the ratification of all amendments, and expressed the dissolution of the Union between itself and other states under the name of the United States of America. Secondly, the Confederal Constitution embodied *explicitly* the interpretation which the Secessionists had long urged : (a) The Preamble said, ' We the people of the Confederate States, each State acting in its sovereign and independent character . . . ' (b) That legislative power was delegated was emphasized. (c) Slavery was absolutely guaranteed as immune from Congressional intervention.

This view of the Union Lincoln contradicted in his noble Inaugural, and its doctrine, made to prevail by victorious War, became, for various reasons, the accepted foundation of the Republic.

Lincoln repeated Webster's views, with but slight modification. No state may secede, therefore the ordinances were void, acts of violence, revolutionary. The Union was unbroken. What is the issue which threatens the Union ? It is that the constitution has not been able to provide for every question ; and on the issue of slavery that is true. Such issues are, under the Constitution, determinable by a majority vote. Will the minority deny that authority ?

' If a minority in such a case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them ; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. . . . Plainly the central idea of secession is the essence of anarchy. . . . Unanimity is impossible ; the rule of a minority, as a permanent arrangement, is wholly inadmissible ; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.'

**The Essence of Federal Association.** Lincoln then enters upon a train of thought which gets to the very core of federalism, and is generally revealing of the State. ' Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them.' Lincoln means that while there is contiguity unity will grow out of the everyday mingling of the people. ' A husband and wife may be divorced and go out of the presence and beyond the reach of each other ; but the different parts of our country cannot do this.' If they could, Lincoln must mean, then secession might be good in law because possible and emergent in fact. ' They cannot but remain face to face, and intercourse, either amiable or hostile, must continue between them.' Is the presumption for a life of well-being now in favour of Union or of secession ? Lincoln answers,

'Is it possible, then, to make that intercourse more advantageous or more satisfactory after separation than before? *Can aliens make treaties easier than friends can make laws?* Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions as to terms of intercourse are again upon you.'

What did the Civil War 'settle'? American constitutional lawyers and political scientists now assert that since the Civil War the Union is properly regarded as a national body, the states being within the system, and not capable of acting outside it. There is no division of sovereignty: the constitution is supreme, and the Court is the only judge of the relationship between the parts and the whole of the constitution.<sup>1</sup> It is said that the opinion in *Texas v. White* (1868) is 'an authoritative statement of the doctrine accepted by the Supreme Court of the United States'. This opinion is thus developed: (1) The Union was never a fully artificial and arbitrary relation. It had a necessary basis in environment and human sympathies and interests. (2) Yet the states retain 'distinct and individual existence' and the 'right of self-government'; they retain all powers not delegated to the U.S.A., nor prohibited to the states; states are such as have their own government and all the functions essential to separate and independent existence, and without such states in the Union, there could be no such political body as the United States. The states must be preserved as well as the Union. 'The constitution in all its provisions, looks to an indestructible Union, composed of indestructible states.' (3) 'Revocation and secession are impossible, for the Union is perpetual.'<sup>2</sup> Later cases extended the doctrine of nationality as the source of powers of the Federal authority; thus in the *Legal Tender Cases* (1871) Justice Bradley said:

'The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. . . . Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.'

It has become a commonplace of American political science that the Civil War 'settled' the principle that America was a nation and that the Federal authority was arbiter of disputed territory in the constitution.<sup>3</sup> We have quoted legal decisions to show this, but it

<sup>1</sup> Cf. Willoughby, *Constitution of the U.S.A.*; Burdick, *Law of the Constitution*.

<sup>2</sup> Cf. *Knox v. Lee*.

<sup>3</sup> E.g. Beard, *American Civilization*, 377: 'The union was declared to be perpetual and the right of a state to secede settled by the judgement of battle'; Schlesinger, *Political and Social History*, 254: 'The great constitutional issue upon which the war was avowedly fought was resolved once for all in favour of the supremacy of the union. . . .' Cf. also Gettell, *American Political Thought*, p. 397.

must be admitted that in *Texas v. White* considerable care and restraint are used in the enunciation of the State-Federal relationship. It is much more guarded than many subsequent opinions. Yet its terms are not a final or decisive and invincible criterion. For example, what is meant by the 'functions essential to separate and independent existence'?, or 'separate and independent autonomy of the states'? How is a state 'indestructible'—supposing that its powers are subjected to gradual attrition?

The truth is that the Civil War did not 'settle' anything, except that the North was physically stronger than the South. Is it possible at all to say that a doctrine of the constitution, a spiritual thing, triumphed on the battlefields? The Civil War settled one thing only: that the North could kill and wound more Southerners in a war over slavery. Yet it may be urged that Lincoln's view of the Union had a compelling spiritual influence upon his generation; triumph in war emphasized it, and while weakening the opposite theory of the South, perhaps it made all, North and South, realize, as never before, that under no circumstances ought there to be any appeal beyond the constitution as interpreted by the Supreme Court.

We must, however, admit that other forces were contributing to this result. The war coincided with the full force of the Industrial and Transport Revolution in the U.S.A.; as the Middle and Far West were opened up, railways knitted state to state, and reducing the significance of locality, brought about more closely than before that physical contiguity which Lincoln had said was the natural basis of Union and the foe of secession. In short, the United States shrank: and shrank joyfully, because new industries, finance, commerce and communication offered opportunities and material welfare for which people were prepared to accept the essential condition—national supremacy. That tendency has not yet weakened; and in the cases decided since the 'seventies, the states have received mention and glances of pity; yet their very Police Power, as we have seen, has suffered serious inroads. Moreover, people have migrated to the United States with respect for 'America', and not for the states, as we have shown in our discussion of 'Sectionalism'; and the last three generations have come under the full influence of recently created doctrines. Can we call this condition, 'settled'? I think not. It is very possible that the Sections, if not the states, will one day find good cause to challenge the Settlement; and then they will use this very argument, that the Civil War 'settled' nothing, excepting the death of so many men, and the destruction of so much property, and the enunciation of so many phrases.

American political scientists soon discovered the philosophy to explain and justify the Nationality which is said to have been created by the Civil War. It now came to be argued that what was consti-

tutional was not to be learnt from the written terms of a constitution only; there was something beneath and beyond constitutions which created the written terms, and something more besides. State and nation were products of certain natural phenomena: in environment, compelling, in men very largely instinctive. This actual, natural constitution was that to which written constitutions must conform; and if they did not in set terms, then they must be so construed by the implication of the natural facts of nationhood.<sup>1</sup> It was now insisted that the primary and supreme grouping of American facts, was the Union as a whole. 'Back of all the states, and of all forms of government for either the states or the Union, we are to conceive of the nation, a political body, one and indivisible.'<sup>2</sup> 'Community of language, law and general civilization, similar political views and a similar experience, together with interests that can be reconciled (enable men) to form a close union, which alone after a lapse of time ensures the perpetuity of their political forms.'<sup>3</sup>

A similar trend is discernible in the judgements of the Supreme Court. It must be admitted, even by American reformers who are rightly dissatisfied with the tardiness of social reform, that since the Civil War, the Court has more often than not stretched the constitution to admit laws for the national good, though at the expense of state powers. Have not the interpretations of the Commerce and Police Power vied with the War itself as subjugators of the states? In another connexion, Justice Holmes said:

<sup>1</sup> Thus Jameson (*Constitutional Conventions* (1866), Sect. 63) distinguished between constitutions as 'organic growths' which are produced by natural and political factors, that is, pre-juristic forces, and constitutions as 'instruments of evidence', stating a particular form of governmental machinery. Others (Milford, *The Nation* (1870), Chap. IX) distinguished between the constitution derived from the nation's historical development, and the 'enacted' constitution; between the national constitution emanating from the mentality and wants of the people (Brownson, *The American Republic* (1866), Chap. VII), and the legal terms of government. Still, even such interpretations of political forms did not necessarily result in the postulate of the paramountcy of nation as a whole over the states. Read by a States-Rights enthusiast, he might have inferred that the actual forces properly made for state supremacy and not national. Something more was needed to vindicate the primacy of the nation. This was supplied by a succession of works, influenced by, if not founded upon, the political theories of Burke, De Maistre and the German Romanists. Briefly, the notion that states were founded on contract or compact had been denied by these writers, who substituted a kind of instinctive grouping of families, races, and classes, without rational delimitation of the terms of association. Thus Lieber, himself of German descent.

<sup>2</sup> Jameson, *op. cit.*, Sect. 51.

<sup>3</sup> Burgess (*Political Science and Constitutional Law*) saw in the whole of the United States 'an ethnic unity inhabiting a geographic unity'; hence the Union was paramount and sovereign. This dictated the constitution, and in it the members were 'commonwealths', not states, that is, political entities supreme in the limited sphere, but not sovereign. Wilson went as far as this also: according 'dominion' to the states and 'sovereignty' to the Union. Willoughby, both in his jurisprudence and his comprehensive commentary upon the American Constitution, argues that the constitution was preceded by national feeling, and that this, through the medium of the constitution, is paramount. Cf. Woolsey, *Political Science* (1878), II, 251 ff.

'When we are dealing with words that also are a constituent act, like the constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; *it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.*'<sup>1</sup>

**Implications.** What does American experience imply? There is no doubt that at the commencement of the Union its creators and contemporaries did not know exactly what they had created. Severally they were agreed, individually they were neither sure nor settled. Secondly, the association changes its nature in the course of time; whatever it was at the beginning, only the operation of the environment and the human spirit evokes its meaning; and then the terms are made to reflect the actual association of men in the varying circumstances of the hour.<sup>2</sup> In the light of this truth, no arrangement can be called 'settled'. There is settlement only for a time until necessity calls for invention. Yet that which is settled even temporarily, becomes a concept, and a concept has power over the mind, which deems established things 'right', causing the perpetuation of a mental attitude and schemes of value, even when the original foundations are visibly in dissolution. Hence, thirdly, the importance of the names invented to designate the Union—of 'confederacy' and 'system of states' on one side, and on the other of 'federation', 'federal republic', and the use of the term 'commonwealths' instead of 'states'. Hence also the interminable controversies regarding 'sovereignty'. The number of really impartial jurists or political scientists who occupied themselves with its definition is inappreciable: men were interested in the term because they were interested in asserting the actual location of supreme power. Now, in order to do this, they bandied with the word 'state'.

It was fortunate for those who sought to maintain the supremacy of the states, that their areas possessed the name 'state'. For since the breakdown of the Middle Ages, states had steadily proceeded to the acquisition of political supremacy, 'sovereignty'. The early use of state as signifying merely commonwealth, an ordered social existence, had been superseded by its employment as supreme authority. Thus wherever there was a state there was sovereignty; the community called 'state' was deemed to be invincibly and perpetually independent and supreme. All those, therefore, with an interest in the power to nullify and secede, said that the states were parties to the association; while opponents argued either that America had never known

<sup>1</sup> *Missouri v. Holland.*

<sup>2</sup> So Canada (cf. Kennedy, *The Nature of Canadian Federalism*), and Australia and Switzerland.



individual states, since the colonies had proceeded direct from subordination to England to subordination to the fellowship which fought the War of Independence. Or they accepted the neo-German theories that there could be non-sovereign states : that a state could remain a state though subordinated in a perpetually binding national arrangement. Another way out was to ascribe sovereignty and statehood to the Nation, and only a grand ' provincial ' status to the states. Yet the States are still very powerful.

**Dual Allegiance.** It is clear that Federalism is a difficult system to work : not because it is difficult to design a constitution, but because the task of governing a vast area whose component regions are so diverse necessarily taxes human capacity to its utmost. That is the essence of the difficulty in Federalism. The larger the Federal state the more the difficulties, because industries, occupations, products are so different, and so different, too, the consequent aspirations ; distance cuts them off, dialect estranges them, even physique marks off the several areas.

Is this, however, essentially different from the problems which arise in a Unitary State of large extent, and diverse interests ? Are there not minority problems there also ? There is a difference, and one only : in a Federation, the term ' state ' requires a great deal of living-down since it is a concept which inspires a feeling of independence, or comparatively stronger allegiance to that entity than to the Union. It is one more rallying-point for any aggrieved minority. Yet even this difficulty becomes of less importance when the area of the Federation is small : where, in other words, contiguity militates against suggestions of difference between the parts. Where the geographical conditions are not steadily adverse, separatism is surmountable in a short time. Dual allegiance in any case is not a vital everyday problem in Federations, and in the smaller or older Federations is practically unfelt, though the feeling of State citizenship is very vivid. However, there is friction on the occasion of important innovations in policy or judicial decisions, and jealousy and murmuring arise. When vital matters are in dispute war is possible ; when the subjects of controversy are not serious enough for war, anger must be suppressed and trouble taken to adapt one's situation to the settlement. But this is the case with minorities in a unitary state also.

What Federalism does, however, and this is its great benefit, is to *establish the presumption that there shall be no war, that disputes shall be settled by agreement, and that the central authority shall be specially sensitive to the needs and claims of the local authorities.* An atmosphere of continuous conciliation is created and maintained, of subordination of all authorities to the fellowship. For this benefit, which is impossible among a congeries of independent and suspicious states, something has to be surrendered ; and the more permanent it is desired the benefit

shall be, the more must be conceded. That is, one gets nearer and nearer to nationality: a consciousness of kind embodied in the authority of a single supreme government. It is also perceptible from American history that the further away one is from this state of affairs, the more reliance is placed upon the safeguard of minority rights by provisions for qualified majorities, two-thirds, or three-quarters, or unanimity, for important decisions; while the nearer one approaches full nationhood the more authority is accorded to the simple majority of the aggregate body of citizens. In the first case special weight is laid upon the representation of states; in the second upon representation by general constituencies; in the first upon obstructions to the increase of the administrative and legislative competence of the central authority; in the second, upon facility to expand federal competence; in a confederacy upon federal action through the states, in a federation upon federal action directly upon the citizens.

We have already seen what factors gave rise to these various solutions of the problems of political association in the U.S.A. and Germany, and we have observed how intricate and various are the institutional arrangements. The theories of Federalism have attempted to explain the nature of the arrangements as a whole. German theories have followed the same general development as the American, sometimes being directly produced by the application of American theories to German conditions. We need do no more than glance at the development.

**Germany.** German theories suffered from three environmental maladies: they were often made without observation of practical experiments; they were made by *jurists* who attempted to universalize the qualities of one or two concrete examples, and, therefore, sought a solution in terms of 'sovereignty'; they were made, in the latter part of the nineteenth century, by jurists who were biased, consciously or unconsciously, by State or Federal sympathies.

Almost all discussions raged around the comparative nature of the terms *Staatenbund* (Confederation) and *Bundesstaat*<sup>1</sup> (Federation). The distinction was first made by Zacharia in his commentary on the *Rheinbund*,<sup>2</sup> in which *Staatenbund* was a system destructible by the assent of the individual members; while in a federation such destruction was impossible. In the succeeding decades this was generally accepted as the distinguishing mark of the Confederation, and it is a well-established tenet of both politics and law that the states in such an arrangement are sovereign, the federal organs being strictly their delegate. Certain secondary marks of difference were, however, established, these in some cases obscuring the first. Such were: that in a Confederation the confederal organs act through the state govern-

<sup>1</sup> Sometimes called a *Völkerstaat* or a *Staatenstaat*.

<sup>2</sup> Cf. Brie, *Der Bundesstaat* (1874), p. 49 ff.

ments, and not directly upon the citizens ; that the Confederal State has a restricted purpose, the Federal State a wide one ; that while in a Federation the central authority had a fairly easy method of increasing its own scope of power, called the *Kompetenz-Kompetenz*, this, indeed, when unrestrained, being the special mark of a perfect state, in a Confederation there were impediments to such a course, sometimes complete obstruction being possible by the exit of a dissatisfied member. Moreover, there were differences of organization essential to each type of association ; thus, in a Confederacy, the financial resources of the central authority could come from state contributions, in a Federation from its own taxing powers ; it was remarked that the Federal State originated in a majority vote of the aggregate of individual citizens, the Confederacy in a pact or resolution of the states ; and whether there should be a Directory or a Kaiser was made a vital point of distinction by the Bavarians. Yet it was seen that even a Federation does not imply complete unity : that there must be equality of all the members, or, at least, a proper arrangement for maintaining the identity of the States and assuring their participation in the making of federal policy. How much of these were included in the one or the other form of association, depended upon the peculiar political shade of unity desired by the writer. These categories were drawn from the examples of the Holy Roman Empire, the Rheinbund, the Confederation created by the Congress of Vienna, the Swiss Confederations, the history of the Netherlands, and from time to time, the American Union.

From 1848 the full force of American experience was brought to bear upon German minds, through De Tocqueville's *Democracy in America*, an unfortunate mentor in many ways, because it founded itself upon the idea of 'divided sovereignty', as though that were universally accepted in America, and permanently true. That work did not bring into proper prominence the full significance of the secessionist views which were then in full tide, and assumed that the absolute powers of the Supreme Court to judge hard and debatable cases was undisputed. De Tocqueville spoke of the Union as 'an incomplete national government', whose chief features were the fusion of various states into one nation in respect of certain common interests, while these states remained independent of each other for all other interests. 'The object was so to divide the authority of the different states which composed the Union that each of them should continue to govern itself in all that concerned its internal prosperity, whilst the entire nation, represented by the Union, should continue to form a compact body.' There was a system of 'divided sovereignty', in which each government enjoyed an independent share, and was sovereign over that share and nothing more, possessing the means adequate to that enjoyment : the states had their instrumentalities, and the Union its own. Moreover, in this division of power, the power of the Union was the exception.

that of the States the rule. There had been other composite states, but the American was characterized and invigorated by the Federation's right to administer its own enactments, and its independent sources of revenue. Moreover, its subjects were private citizens, not the states. The system was not National, it was not Confederal; and one could not, for fear of misnaming, even use the term Federal. The name for the system had not yet been invented. It was, however, a system of remarkable political value: 'The Union is as happy and as free as a small people, and as glorious and as strong as a great nation.'

Now, although De Tocqueville made it quite clear 'Why the Federal system is not adapted to all peoples', and explained the spiritual and geographical circumstances which enabled the 'Anglo-Americans' to adopt and maintain it, his description, without these qualifications, was transformed by Waitz, the German political historian, into a doctrine of absolute validity, and this powerfully influenced German thinkers until 1873.<sup>1</sup>

What it is important to observe is this: that to Waitz these things were *essential* to the Federal state. In other words, the inference was that all who were striving for a 'Federal' state ought to strive to secure these things: were these not obtained, then a necessary support of a 'Federalism' was missing, then sovereignty would not be divided, as it necessarily should be in a Federation, and there must be degeneracy in a Confederation.

Broadly, Waitz's terminology and theories gained general acceptance, but it must be admitted that, from time to time, important, if not spacious exceptions, were noted. Ahrens, for example, believed that in a true Federal state, the states must be assured of *influence* as a compensation for what they had surrendered, while Rüttiman, in his work on Switzerland, pointed out that the principle of mutual independence of the Federal and the State governments must not be taken absolutely, but that a certain supremacy of the Union over its parts was unavoidable, and this could be seen in the Swiss Confederation and the U.S.A.

We need not follow out all the variations of theory and concept in the years immediately following: it is enough to say that none

<sup>1</sup> Waitz distinguished between *Staatenbund*, *Staatenreich*, and *Bundesstaat*. In the first the states were sovereign, at least the totality was not a state; in the second, the states are not sovereign; while in the third, each, States and Bund, is State in its own sphere. When he spoke of *Staatenreich*, he thought of the old German Empire, in which the states played the part of provinces to whom the Reich had devolved very wide powers and liberties. The distinguishing feature of the *Bundesstaat*, the Federal State, was its direct action upon the people; this in a system where the powers were divided between states and federal authority; each was sovereign; each was independent; each acted directly upon the citizens. This fundamental bisection was to be maintained by three institutions: the Union must have its independent instrumentalities; its own financial resources; and the organization of powers must be propitious (*Grundzüge der Politik* (1862), p. 153 ff.).

could avoid the influence of what people wished to see actually take shape in Germany. Men took different attitudes towards the place of the individual States in the *Bundesstaat*, according as they desired, or did not desire, the subordination of the States. With a *Staatenbund* most were dissatisfied; a *Bundesstaat* was desired, but if it were to be reached, did it include the loss of sovereignty of the individual states for the benefit of the Union? Answers differed.

Then a new current set in. Questions of sovereignty could not but be raised recurrently while Unity was being sought but was not yet attained. It was urged that the states could no longer be states in a Federal state; that the movement for unity was really a movement not for a Federal but for a Unitary state (*Einheitsstaat*), for surely every permanent military alliance with organized institutions and a prohibition of direct action within the alliance was already a Federal state?—and unitarists obviously desired more than that. It was urged that while a Confederation is based only upon compact, a Federal state is based upon a constitution accepted by the majority of the nation as a whole; that in a Federation the *spirit* of association was different from that in a Confederation, it was a spirit of higher organic unity.

Then came the Federations of 1866 and 1871, and at once the jurists had to fashion their commentaries, to 'construct' the constitution. Bismarck had pieced this machine together as he could, and there is no doubt to-day, with all the material before us, that he recognized the sovereignty to be in the states; we know also that separatism had hardly been overcome, and that although the constitution was declared an 'everlasting union', it was between Princes very loath to admit a loss of sovereignty.

Now the majority of German professors of law were in the ranks of unitarists, and therefore urged that the Reich was a *Bundesstaat*, a Federal state, since this betokened, by all that had been said before, a higher degree of unity, of nationhood, than in a Confederation. This meant that either a divided sovereignty was recognized or that ultimate sovereignty was in the Union, and the latter was accepted by the majority of jurists, and demonstrated by reference to Articles 2,<sup>1</sup> 4,<sup>2</sup> and 19.<sup>3</sup> Some, of course, suggested a mixture of forms. The first impulse was to show that the differences between the Reich and the hitherto recognized Federal types were only exceptions, not fundamental; the next to find a new theory and fit the Reich into it.

The first impulse was revealed in the discussions of the *Kompetenz-Kompetenz*. This had caused lively debates by the parties and parliaments which discussed the constitution, and great weight was laid on

<sup>1</sup> Imperial laws take precedence of the State Laws.

<sup>2</sup> Declares the scope of Federal powers in legislation and superintendence.

<sup>3</sup> Federal execution.

whether any extension of Federal competence would require a fresh compact between the states or merely a constitutional amendment, even if it were more difficult than the passing of an ordinary bill. The North German Confederation, in Article 78, certainly allowed constitutional amendments, but whether this implied extension of competence, could only be, and was, argued by jurists, on the *general* theories of a Federal state. Some denied that the power was included in Article 78, for only the states had an *unlimited* power, the Union a limited power, and if the *Kompetenz-Kompetenz* was recognized in the Union, it ceased to be a Federal state and became a Unitary state. Yet others argued that to allow of increased competence was not a violation of the idea of a Federal state—their reasons were various, and were obviously personal: such as, that, in a Federal state, the Federal authority was in every direction recognized as the most competent authority in the whole territory, and therefore it *must* have the power to increase its powers, or, that experience showed that there was a fundamental necessity for this power, and, that indeed, this showed that the Federation was a *State*.

Then the question of direct or indirect executive authority, and the central institutions, put jurists into a quandary, from which all emerged with different answers. Matters had reached such a pitch by 1872 that no consensus as to the meaning of Confederation and Federation existed, and no certain and distinguishing mark remained.

The interesting question which might have been asked was, whether a mark of distinction was at all necessary? The answer must have been in the affirmative, and must still be in the affirmative. Not that, if we think that there should be a clear mark of distinction, we shall easily be able to find one. But while it is possible for professional students to dispense with names and concepts, and create their definitions only when conference or action compels them to, because they are able to command all the facts and to think, distinguish and define, that is not possible for the layman, the politician, or the immature student. These need definitions, criteria. Moreover, those definitions are at once incitements to some, and restraints on others, controlling their political activity. Say that this is a Federal state, and of necessity possesses the *Kompetenz-Kompetenz*, and you influence all centripetal and centrifugal movements. The demand for definitions is strong: for a name is a power.

Hence, with Max von Seydel, in 1872,<sup>1</sup> a new activity began, impelled by the theories of Calhoun, that sovereignty could not be divided, that sovereignty lay in the individual states, that such sovereignty implied a 'system of states', a Confederacy, and that a Confederacy implied secession, any arrangement denying these principles being National in character. 'Sovereignty may not come up

<sup>1</sup> Professor of Constitutional Law in München, *Der Bundesstaatsbegriff*, 1872.

against any frontier within the field which it rules, where any equal might cry halt! As soon as it is not *completely* sovereign, it is no longer *the* sovereign.’<sup>1</sup> Therefore not all *Bundesstaaten* (Composite States) are *Bundesstaaten* (Federations); they are either *States or Confederations*. Switzerland, the United States, Germany, were Confederations, founded on compacts which had not affected the sovereignty of the individual states. No legal clause could make that which was actually a state, into something which was not a state. The whole theory of Federalism was bankrupt because it drew no sharp line between a state and part of a state: it lacked the essential necessity of a ‘juristic conception—definition’. Hence, he could not recognize the existence of an entity called a Federal State; there could be nothing in reality to correspond to what was called in the terminology of German jurisprudence, ‘Member-States’ (*Gliedstaaten*),<sup>2</sup> or ‘Sub-States’ (*Unterstaaten*).

Seydel’s simile is important: ‘The proposition that a number of states as such continue to exist, yet at the same time can constitute a new state, sounds exactly like the proposition that if one binds twenty-five sticks together, a twenty-sixth comes into existence. Only a bundle of sticks are obtained; not a stick.’<sup>3</sup>

Now Seydel had put the issue very clearly and his parable shows it. Jurists must henceforth (1) recognize sovereignty to be the basis of the distinction between Confederal and Federal states, or (2) attack the principle of sovereignty. It was important that one or the other should be attempted, for as we have said, a concept is a political force.

The ways out, actually followed, were (1) the acceptance of sovereignty as authority one and indivisible, yet with the denial that the conception of sovereignty was necessary to the question; (2) that not sovereignty, but other characteristics, were essential to statehood; (3) that, *in the actual modern conditions of social life, there was a series of associations of graded importance, and sovereignty could lie in the whole arrangement of inter-related groups, small and large, and that if ‘State’ must be applied to the members, it must be state without sovereignty*; else a new name must be found for new phenomena. Laband and Jellinek (with differences) followed the first way, Brie the second, and Gierke and Preusz the third. We outline only the most important, Laband, Jellinek and Gierke.

Laband argued that a state could still be a state, even if it were not sovereign, because it could still be ‘the independently empowered bearer of the most comprehensive and important public supreme authority’.<sup>4</sup> That is, Laband stressed the *relative* nature of state-

<sup>1</sup> Op. cit., p. 29.

<sup>2</sup> This term was used by Preusz in 1919 to describe the states in his unitary federation.

<sup>3</sup> Seydel, *Commentar zur Verfassungsurkunde für das deutsche Reich* (1873), p. 9.

<sup>4</sup> *Staatsrecht*, I, 56, 57.

hood : though, from the standpoint of external observers, a state might have less than the independence elsewhere enjoyed by unbound states, that is, that looking outwards it might be a subject, yet, compared with its colleagues and its own domestic groups, it was an independent and supreme master, and, hence, still deserving of the name of state.<sup>1</sup> A *Staatenbund* is a Society ; and a *Bundesstaat* a Person.<sup>2</sup> In the *Bundesstaat* the central authority is the servant of the needs of the member-states, and these, again, are the members, the subjects of the Union. Now, if the member-states had no say at all in the policy of the Union, then the composite state would not be a *Bundesstaat*, but a suzerain-state, which would be, as a state, independent of its subordinates. In a *Bundesstaat* the totality of member-states form the unity, and the 'juristic person of public law', called the Imperial Authority, and possessing the rights of government, consists of the bearers of state sovereignty. This is sovereign, not the states ; but in a Confederation, which is only a Society, the Confederation is not sovereign. Thus, commencing with the premiss that sovereignty was unnecessary as the mark of a state, Laband ends with the deduction that in a Federal state, sovereignty lies with the Federation (as an association of the States, not simply as the central government) and not the states. In the German Empire the supremacy of the Reich over the states was clear—its laws prevailed ; its competence could be increased ; the states were supreme in their sphere, but the sphere had limits.

As might be expected, Laband's distinctions threw the whole of German jurisprudence into convulsions. They were the convulsions of a jurisprudence which still attempted to keep alive doctrines of the state which daily became more untenable, for the states in the German Federation were being extinguished. Had the states been conquered sharply and violently, jurisprudence would have shriven them at once, the lawyers had met such situations before. Since, however, the states were but slowly asphyxiated, and then against strong resistance : by economic and spiritual forces which operated less violently than decisive war, the lawyers were nonplussed. Had Laband remained sternly consistent in his expulsion of sovereignty from the states, without making them the return of it by 'the supreme right to govern', (*Herrschaftsrecht*), he would have given a sound stimulus to German political thought.

Jellinek<sup>3</sup> was as much a political scientist as a jurist, and recognized that every fact may be regarded from many different points of view, and that, therefore, definitions are not decisive.

To understand states in all their varieties, said Jellinek, one must disclose their origin, *in fact*. A state, that is, an authority from whose grasp secession, individual or social, is impermissible, cannot be created

<sup>1</sup> *Staatsrecht*, I, 59.

<sup>2</sup> *Ibid.*, I, 56, 57.

<sup>3</sup> *Lehre von den Staatenverbindungen* (1882), p. 262.



merely by treaty or contract. Forces contributing to an organic fellowship are prior to the state. And, if one wishes to understand the Federal state, then it must not be treated as an isolated phenomenon in the life of nations. 'Federal States are formed by the same process as *national states*.<sup>1</sup> The Federal state is one of the forms in which the modern state, established upon national community or inward historical fellowship of some other kind, is realized.' Here, for the first time, are realities: In early days rulers sought for a people: to-day peoples, nations, seek their appropriate forms of government. The way is twofold: war and revolution, or by peaceful paths. The Federal movement is a peaceful mode (!), hence there was no violent abolition of the hitherto existent and legitimate authorities. Yet, a 'completely new creation' occurs,<sup>2</sup> and for the jurist *this is the fact*; nor have the previous juristic facts any real bearing on the nature of this creation. In Germany, as in America, the states had merely promoted this development, they had not produced it. There was no causal relationship between the act of union of the princes and the rise of the Federation. This, in fact, consisted of an organization created by national feeling to accomplish its purposes. Such an organization is a constitution. 'The most important element in the conception of the state is that it is an Order, and an Order before an Ordering is a self-contradiction.'<sup>3</sup> This order inheres in facts, not in a set of rules. The jurist only *commences* from this point. But he must look behind the formal imposition of a Constitution by the sovereign princes: to go no further than their action is to misunderstand a fairly simple act of national generation. The princes, and the Congress which establishes the constitution, have no more real causal effect than the provisional governments which elsewhere have given birth to constitutions. State ratification is not necessary; but it is useful to obtain the acknowledgement of the new state of affairs by legal procedure. The laws passed by the German States for entry into the North German Confederation and the Empire, were nothing but solemn declarations, and were certainly not in the nature of treaties.<sup>4</sup> To argue otherwise would be to admit that the Reich was not a state and that there was a right to secede. The Constitution is valid the moment it begins to operate: and that moment, too, sees the birth of the state. Then, also, the states are subjected to the authority of the new state—the Reich—and receive from it the rights allowed them as member-states by the constitution. There is no reservation on the power of the Reich, for this would deny statehood to the Reich. (*Why, not?* is not answered, but the unexpressed answer probably was, that Jellinek privately preferred to think of the national forces as ruling

<sup>1</sup> *Lehre von den Staatenverbindungen* (1882), p. 263.

<sup>2</sup> p. 264. <sup>3</sup> p. 266.

<sup>4</sup> Thus Laband, and especially Hänel, *Studien zur Deutschen Staatsrecht*, I, 68 ff. The latter work was strongly influential.

this in favour of the Federal authority.) The member-states have certain rights by virtue of the special procedure written into the constitution: amendment is made difficult, or certain matters require unanimity. The rights, however, are possessed only *within* the constitution. The inclusion of the Southern States in the North German Confederation was only a constitutional amendment.

Jellinek's history, founded upon the creative forces of nationality in the background of the states, determined his theory of the nature of the Federal state—or, if you like, his version of the history was determined by what he wanted to say about the nature of the Federal state.<sup>1</sup>

The national forces could act by excluding any governmental organ between the centre and the citizen when it was a Unitary State; or permit intermediate associations, at once self-governing and agencies for itself, when it was a Decentralized Unitary State. Or, it could by renunciation, assign to existing organic associations, a sphere of power for quite independent execution, and if there were such units, quite uncontrolled, they would be 'states', and a state composed of such units would be called a *Staatenstaat*. But if the powers of the centre are yet at all directly imposable upon the people, and if it can invalidate any of the actions of a member-state, then it is a *Bundesstaat*, a Federal state. Thus,

'a Federal state is a state in which the sovereign authority constitutionally distributes the totality of the functions exercisable within its scope, so that it only reserves to itself a specified quantity for direct exercise, and leaves the rest to be exercised without control over the establishment of the ruling principles and the ways and means of their actual execution, so long as the constitutional limits are not infringed by non-sovereign member-states, which are created by an independent state authority by means of this constitutional assignment of powers.'

People dwell henceforth under both a sovereign (Reich) and a non-sovereign (the States) authority, and the latter is a creation of the former. Hence, Laband is wrong to place as much stress as he does upon the treaty elements in the Reich; for such an attitude can only involve the view that the states have created the Reich. The Reich, if it be a Federation, must operate directly, in some respects, upon the people: for this alone renders possible an organic life for the Reich, since coercion of a recalcitrant state is very, very difficult. From these foundations follow all the organizatory arrangements. A Parliament is needed, but a Senate representing the states is not essential, though expediency may suggest its acceptance. There is no specific division of powers for a Federation. The essence of its existence lies in the sovereignty of the central authority, direct subordination of the people, and the existence of member-states. From these premises one can decide all other questions. Certainly, it has a power of constitutional amendment; certainly, the states have no right to secede; certainly,

<sup>1</sup> Especially pp. 298, 299.

there is no limit to the power of the Federation to evolve under the pressure of need.<sup>1</sup>

We turn to the last of the main tendencies in German Federal theory before the War,—the vindication of the non-sovereign state and the assignment of sovereignty to the Federation as a whole.<sup>2</sup> Gierke denied that the distinction between 'national' and 'local' interests was sufficient to distinguish political authorities: for a little town might, by historical accident, be a City-state, while a great Prussian province might be deemed a mere local government area. He suggested that Laband's argument that a *Bundesstaat* was distinguished by the participation of the states in government could not stand against the possibility of a similar co-operation of municipalities and provinces in a Unitary state. Nor was its essence to be found in indirect action upon the citizens—for nowadays Federal States did, and could, act directly upon them. Hence they were more and more like Unitary States. Moreover, local government authorities tended to mediatise government in as fundamental a way as a state in a Federation.

Yet somehow we must find where sovereignty lay, or in his words, we must search for statehood in the Federation.

Now Gierke's contribution to political thought and jurisprudence lay in his theory of associations, and the essence of this was, that all associations had a real and original personality, not merely a juristic and given personality. Each of the parts in a great association like the state has its rightful and real status, being sovereign over some things, and subject to the higher association in others, and so equally the larger association is not without limits upon its power, that is, without obligation, and equally may it exact obedience—but *properly*,

<sup>1</sup> Jellinek's work was written in 1882, that is, after ten years' experience of the Federation, and after a decade of plentiful discussion. Brie, who treated his subject both historically (*Der Bundesstaat*) and analytically (*Theorie des Bundesstaats*), followed close upon him, having in fact reviewed Jellinek's work. Already 'sovereignty' had nauseated its exponents and produced stultification. Then Brie used as his criterion of a state the political 'all-roundness of its power'. A state in a Federation has this, so has the Federation itself; but a municipality has not. What Brie means then is this, that any body with *very* important powers is a state, whatever its connexions and dependence upon other authorities. *How* important the powers must be, he never says, but they must be important, 'in principle, all-inclusive'. Now this approach has many weaknesses: for example, to define by *purpose*, as Laband pointed out, was exceedingly dangerous, for who could really define the state's purpose? Yet there was some good in it, for it drew attention, at any rate, to alternatives to the unbreakable circle—state-cum-sovereignty, and emphasized the notion of the 'non-sovereign state'. This had been done by Rosin a few years earlier, who showed that State and Municipality differed only in the extent of their powers, which were determined by their purpose. He proceeded to the proposition that both the Federation and the States are States; the duty of fulfilling 'national' functions is shared; that the Federation, however, is alone sovereign seeing that this alone possesses 'exclusive self-determination'.

<sup>2</sup> For what follows see Preusz's *Gemeinde, Staat und Reich*, where ample citations are given.

in the spirit of association. But something must be supreme in all these integrated bodies; and, of course, no single one of the bodies is supreme in the sense of being uncontrollable. *Most decidedly the supremacy lies in the integration!* That is the purport of Gierke's theory, and it runs through the entire body of his work. There is a real personality composed of individuals and groups in fellowship, in corporations, in the state, in the composite state, in the world of states. The *quality* of that personality is the supreme compelling agency.

'If modern legal thought recognizes several possessors of state authority in the same commonwealth, then we can only conceive of the relationship that a certain compendium of rights and duties constitutes *one* highest and *indivisible sphere of power*, but a number of beings is called to their *associated possession*. Withal in the Federal state the *state authority is of exactly the same character as in the Unitary state*. The difference lies only in the *peculiar form* of the institutions (beings) possessing the authority of the state, which is not a single collective person, but a number of collective persons ordered together in a specific way.'<sup>1</sup>

That is, the bearer of supreme power is neither the Federation, nor the member-states, each for itself, but the Federation and the individual states in organic association.

So far Gierke had done great service both to the theory of the state and to political thought in general. He then falls into that damned necessity of ascribing statehood to both the individual states and the Federation. The former are states since they have rights which would not be given to smaller corporations and local authorities. But of course they are non-sovereign states. For itself the Federal authority is obviously self-determining, excepting downwards in the direction of the member-states, and at times Gierke forgets that it is the limitations and permissions of the constitution which decide what shall be done in doubtful cases.

All this, however, is unimportant by the side of Gierke's main contention that sovereignty lies in the *Federal arrangement*: in the *constitution* we might say. That is the statement we are prepared to accept as the nearest compendious description of the Federal state. How far the parts triumph in the actual politics of the state, how far the organs of the central authority triumph, is a matter of fact which is different at different times, and in different federations. The legal character of the new state is contained in the constitution, which puts both localities and centre under permanent, but alterable obligations.

Preusz played havoc with all the illogicalities into which Gierke had fallen, but he rendered tribute to the essential soundness of his work. Most of all was he severe upon Gierke's falling back into the slough of sovereignty. Having lived its day, as the feudal tie had served in its time to characterize the governmental life of society, it must be discarded completely. At home and in foreign relations the point of demarcation of the state, downwards to corporations, upwards to the inter-

<sup>1</sup> Cf. Preusz.

national community, was indeterminable. The state was nothing but one provisional stage in the growth of community from its rudimentary beginnings in the family and other groupings : and the law which it gave was not made, but simply the declaration of the forces existent in the communities, overflowing. In short, the law is set by all these, not by the state. There is, then, no real difference between municipal 'bodies', State and Reich. There are gradations of 'territorial' commonwealths : the *common substratum being territory*, and this differentiates them from family, race and people, which are also political bodies. The State and the Reich are different from the Municipalities because they may, while Municipalities may not, change their territorial boundaries, though in the past, before the rise of the State, the Municipalities had this quality.

The power to change territory is a fundamental quality of statehood : for if this is changed the 'body' itself is changed. This vital point had never been observed, because, hitherto, attention had only been focused on the authority of the state, and not on the state itself. One authority might appear to remain the same when territorial changes had taken place ; but certainly the state must thereby have changed : and just as certainly, though not so perceptibly, the authority must have changed in character. This is the only way, in fact, in which a change in the character of the corporate body can come about. Other changes are changes only of *organs*.

Now is there no difference of fundamental character between State and Reich ? According to Preusz, No. For the only quality which would militate against the Reich's being a 'territorial body', would be that it originated in a 'willed' arrangement, and not in a 'process of organic growth'. The states had such an origin : had the Reich ? Seydel had wrongly denied this, resting his theory upon a contract arrangement. But since Hänel had done his work it was generally admitted that the Reich grew and was not made. It was a single community, an actual 'social-law-unity' ; though it included several territories, yet over the whole territory thus included a unity of law prevailed. Now the unity of the law implied the oneness of the territory. What, then, had happened to the States ? Preusz said they had suffered an 'important change' by entry into the Reich, since their territory was now a part of the Reich ; but they had not as states been dissolved and hereby created. They are the same persons as of old, though changed. But annexed states become merely municipalities, or provinces of a state. They are dissolved ; they are no longer states, because they have no longer the power independently to determine the extent of the territory. The Reich has no authority in the matter of changes in state frontiers, it cannot cause nor prevent such changes. Yet any such change which would cause a change of Federal area would need Federal assent. Equally for any change by the Federation of

its territory which would cause a change in a state's territory. These things demand a 'joint act of will'. Apart from this, the Reich is independent in changes of its territory. (That is, I suppose, it could include or exclude states from its area, as, for example, in the inclusion of the South German States by their declaration, and Alsace-Lorraine.)

In what, in the matter of federalism, does wisdom consist? Preusz thought, in escaping from the spider's-web of sovereignty. But he at once got caught in another web equally sticky and stultifying. The real trouble was that the jurists were involved in the spider's-web of discovering a simple and compendious mark of the Federal state. *There is none*, which is true to the complexity of the state: there are some which are nearly true, and one of them lies in defining in terms of sovereignty. If that is accepted one must stretch, divide, unify, complicate, limit sovereignty: and every theorist who cares to add or subtract a jot and tittle from that which is conceived essential by his predecessor, may then establish a theory of his own on equally vulnerable foundations.

Is it not best to dispense with compendious differences between Confederation, Federation and State? Or, if definition is desired, should we not look to the history and circumstances of each and give each the privilege of its own short description? For the German and American and the Australian Federation, is it not better to insist on (1) the denial of secession, and (2) the permanent and comprehensive authority of the constitution, to distinguish them from Confederations; and (3) to distinguish them not from, but *as*, states, that they are states with a *peculiarly* complicated arrangement of authorities and institutions? And (4) within this complicated arrangement will questions of qualified majorities be really different from such things as constitutional amendments, elections (by P.R.) to Parliament, the division of power between local and central authorities, and the position of functional associations, in a Unitary State? We think not. Nor is the notion of governmental powers limited by law and constitution in the interests of popular sovereignty foreign to us; indeed the U.S.A. has for a century and a half operated under a system where Parliaments, the Executive and the Courts are not sovereign. Statehood consists in a complicated arrangement for the dispersion of sovereignty. We have, at any rate, seen how incapably definition has dealt with the diverse forms and institutions of actual Federations; and the political scientist must create his definition from the facts, which are always changing, while the jurist is apparently condemned to look for essences which are so essential that they exclude at least three-fourths of what is politically most important.<sup>1</sup>

<sup>1</sup> The definition of the British Empire, and its proper title, is difficult in the same order as the definition and titles of composite states. Cf. Keith, *The Sovereignty of the British Dominions*, 1930; Noel Baker, *Present Juridical Status of the British Dominions in International Law*, 1929.

## CHAPTER X

### THE GERMAN FEDERATION SINCE 1918

**C**OMPARISON between the Empire of 1871 and that of 1919 reveals tremendous differences in spirit and organization.

The Revolution caused the old powers to break down in November, 1918. The vital force of the Union, Prussia's military prestige, had been destroyed by defeat. Liberalism and Socialism destroyed the dynasties. There was a momentary cry of 'Free from Berlin', and murmurs for a South German Republic. But the very forces which overthrew the old system established a new one—the unity of political parties across state boundaries. The Majority Socialists, Independent Socialists, Spartacists, Democrats and Centre were centralizers, in virtue of their social and economic aspirations. A torrent of projects for a new constitution poured forth, practically all being marked by the expectation of, and the plea for, greater centralization.

The Council of People's Commissaries in Berlin had, from the first, extended its hand over the whole of Germany, in the name of the 'German Socialistic Republic'.<sup>1</sup> The states complained, and were invited to send delegates to Berlin, where the most generous devotion to German unity was expressed.<sup>2</sup> The Central Authority, however, had been warned that it could not go too far. The calling of a National Assembly required that the People's Commissaries should at once proceed to draft a constitution. For this purpose they made Hugo Preusz Minister of the Interior.

**Preusz.** A word or two about his mentality is important. He was a Jew, a Liberal, and a Professor of Constitutional Law. He, therefore, had no patriotic sympathy with the Princes: their states were not ethnic entities but the artificial creations of conquest, theft and marriage. No sentimental tie prevented him from combining them to serve the higher ends of nationality and economy, or from

<sup>1</sup> Proclamation of 12 November 1918 and announcement of 23 November 1918. Cf. Purlitz, *Deutscher Geschichtskalender* (*Die Deutsche Revolution*, I, Nov., 1918–Feb., 1919), 48, 49 for the Proclamation.

<sup>2</sup> 'The maintenance of the Unity of Germany is an urgent necessity. All German races stand united in the German Republic. They promise to work resolutely for the unity of the Reich and against separatist attempts.'—25 November 1918. Cf. Purlitz, Vol. cited, p. 58 ff.

carving Prussia into pieces if a more liberal federation could be thereby achieved. He was a democrat by temperament and studied conviction. His long career as a practical politician in the Berlin City Council, and as a teacher of Constitutional Law (outside Berlin University, where as a Jew, a suspected atheist and *persona non grata* to the Court, he could never expect and certainly never obtained preferment), gave him an almost unrivalled comprehension of political principles and machinery, enriched by study of Continental, English and American democracies. Democracy, with all its modern safeguards, individualism tempered by social administration, the overthrow of Bismarckian federalism and the substitution of a more integrated, homogeneous, united Germany, even—especially!—at the cost of the states, were his guiding principles. With little amendment, considering the immensity of his task, his principles, often down to details, became the new Constitution.

**Towards a Unitary State.** The Constitution of 11 August, 1919, is strongly unitary. What were its dynamic forces? One was the abdication of the dynasties. Suddenly, forces which had for generations successfully acted as a drag upon unity, disappeared. Especially so in Prussia. Further, Germany attained to a high degree of legislative and administrative unity during the War. The process of integration had shown those who operated it, that a great deal of former Particularism was not laudable, but wanton waste. Moreover, the War period had not ended for Germany in 1918 or 1919: hardly yet is it ended, and the pressure for Economy was and is immense. Therefore, that which appeared desirable in easier days to a rich people, ceased to be worth its cost. Again, the National Assembly which made the Constitution was elected by the whole people as an aggregate. There was no participation of the states as formal entities, but the Reich was divided into a number of constituencies with mere geographical significance. Quite expressly, it was as a collection of individuals, uniting for the performance of a solemn political act, and not as states, that the people were asked to vote—at least by the vast majority of candidates. Social policy and democratic institutions were put into the foreground; greater unity seemed to be taken for granted. The National Assembly was the final authority: neither a body representing the states, nor ratification by the states, was to give validity to its work. (We show later how far the states *quâ* states were consulted in the preparation of the Constitution.) All these factors contributed to centralize the Constitution, and continue now to maintain and even promote it. Yet one other element was quite as important as all of these put together: the position of Prussia.

**Prussia's Position.** Prussia had made herself master of Germany, but her mastership was not unchallenged. In particular, Bavaria's jealousy had never been stilled: nor were the states which



had been absorbed by her, Silesia, Hanover, the Rhineland districts, quite happy within her conservative grip. Since 1917 the problem of Germany's future had become very largely the problem of Prussia's future, for a Reichstag with large liberal and socialist elements in it accorded badly with a Prussian Parliament heavily Conservative, and the whole Reich was vitally interested in the outcome of the problem of Prussian electoral reform. For Prussia in 1914 was over three-fifths of the total German territory, and more than two-fifths of its population. What was to be done with this great state? If the old system had continued, either Prussia or the Reich must have become increasingly dissatisfied. It was already within her administrative power to modify almost as she wished the effect of Federal laws. Her position as the central war-making state had caused the exacerbation of separatist feeling, since all ills seemed to come from Berlin. Bavaria complained of '*Berlinerei*', that is Berlin's clumsiness, inefficiency, and favouritism. The parts of Prussia began to shake the framework which contained them—not unaided by Allied propaganda. In the Rhineland and Westphalia it was pretended that the disturbances at Berlin entitled them to form a separate state, and the *bourgeoisie*, the industrialists, and the Catholic Church saw great benefits in 'freedom from Berlin'. Both the Prussian and the Reich governments took a strong stand against such movements.

There was no doubt that something would have to be done in a new Constitution to reduce the actual predominance of Prussia, even beyond the creation of a democratic basis which was to be common to the whole Reich. These separatist movements and the antagonism to Prussia gave Preusz his opportunity. Should the domestic institutions of Prussia be assimilated to those of the rest of Germany, her power decentralized, then her own separatism was reducible, and the unification of the Reich promoted. All the signs favoured such a development.

The result of all the constitutional discussions and projects between 9 November, 1918, and 11 August, 1919, was the creation of a Federal state of such a high degree of unity that constitutional lawyers and political scientists find it difficult to supply it with a satisfactory name. It is variously called.<sup>1</sup>

Naturally, too, the old discussions regarding the nature of the state have been assumed with even more than the old vigour.<sup>2</sup> But our concern here is rather with the institutions and their significance. We describe them in the order adopted for the discussion of the U.S.A. and the German Empire of 1871: but it is essential to commence with an examination of Preusz's projects and the controversies to

<sup>1</sup>, <sup>2</sup> Cf. the various Commentaries to be referred to in future footnotes; Nawiasky, *Der Bundesstaat als Rechtsbegriff* (1920); Anschütz and Bilfinger, *et al.*, in *Vereinigung der deutschen Staatsrechtslehrer* (April, 1924); Fleiner, Lukas *et al.*, *ibid.*, April, 1929 (Vol. 6); and literature in *Handbuch des deutschen Staatsrechts*, I (Anschütz and Thoma), 1930.

which they gave rise. Of course, our concern here is only with its Federal elements.

**The Original Draft.** The Original Draft<sup>1</sup> begins with a practical reproduction of Preusz's federal theory: 'The German Reich consists of its Member-states and the territories (*Gebieten*) whose populations desire admission into the Reich by virtue of their right of self-determination, and who are admitted by a law of the Reich'. Sovereignty belongs to the people; and it is exercised in Reich affairs by the constitutionally appointed organs, and in state matters by the German *Free States* according to their constitution. (Observe the terms *Member-states* to denote the status of obligation; and *Free states* to denote the republican foundation of the states!) The legislative and administrative competence of the Reich was much extended.<sup>2</sup> A President and a responsible Cabinet replaced the Kaiser and Chancellor, the administrative work of the President was transferred to the Reich Departments, but Departmental Councils representative of the states would advise and comment upon their work. There would be no Bundesrat, only a Reichstag, that is a definite Reich institution, but composed of two Chambers—the Popular Chamber and the States Chamber.<sup>3</sup> Where the responsibility of executing Federal law was left to the states, they were to observe the directions of the Federal authority. The Federal government had the duty and the right to superintend the execution of such laws, and for this purpose could send commissioners to the states who were to supply documents and all desired information. (Here already was an attempt to remedy the loose administrative association of the old Reich, in which only diplomatic relations with the state governments was a permissible mode of redressing maladministration. More was to come!) 'In the case of maladministration culpable state officials can be proceeded against on the basis of the disciplinary rules for Reich Officials.' (This was a very bold thrust at the states—at Prussia, also!) Next, it was provided that new states, within the Reich, could be created 'regardless of existing state frontiers'—by consolidation, or withdrawal. (Here was an attempt to make the states subservient to real rather than alleged ethnic and historical groupings and economic circumstances, and also to pave the way for a dissolution of Prussia.) Fundamental principles of the form of government for the states were established: universal and direct franchise with proportional representation, responsible government,

<sup>1</sup> Vorentwurf zur Verfassung des Deutschen Reichs vom 3 Januar, 1919 (unpublished). Reproduced in Triepel, *Quellensammlung zum Deutschen Reichsstaatsrecht* (3rd Ed.), p. 7. See also Walter Jellinek, *Revolution und Reichsverfassung, Jahrbuch*, 1920, p. 46 ff.

<sup>2</sup> Cf. Arts. 3 and 4. All communications became exclusively administered by the Reich. In legislative matters only the competence was extended to insurance, health, press, meeting and association, Church and education, etc.

<sup>3</sup> *Volkshaus* and *Staatenhaus*.

local self-government and electoral principles as for the state legislature. A Supreme Court would take the place of the Bundesrat in political controversies. The state governments would have the right to send representatives to the Reich government to report upon drafts of laws and orders and to express the views of the states in the Reichstag.

The Reichstag was to consist of two Chambers, the first composed of the representatives of the 'United German people'. The State Chamber was to consist of the representatives of the German Free States to be chosen as the state legislatures decided. Then the Original Project proceeded that until the new Free states had been established the State Chamber should be composed of delegates, the number being given for each of sixteen areas—and these areas consisted of Prussia divided into eight, and other states, lumping old ones together, or cutting off parts of them, and including German Austria. But when the new Constitution should be established, there should be one delegate per million inhabitants; while states with less than one million must share delegates with contiguous states, and no state might have more than one-third the delegates. (These provisions affected severely the status of the smallest states, and while seriously diminishing the representation of Prussia compared with the previous actual distribution of strength, it halved her representation on a basis of population.) Laws required the acceptance of both Houses. Constitutional amendments required a two-thirds majority of a two-thirds quorum, and a referendum.

Federal Execution was to follow upon refusal of a state to carry out its obligations.

This Constitution was obviously and unapologetically far more unitary than that of 1871. Above all, the unceremonious refashioning of Germany into sixteen areas, hardly any of which coincided with the existing political areas, roused the acutest fears.

**The Original Published Draft.**<sup>1</sup> With few alterations of importance the Draft we have spoken of was published on the 20 January, 1919. The chief alteration was the omission of the sixteen areas. Thus the two Drafts are almost the same, and in reviewing the Unpublished, we have reviewed the Published, Draft. The Draft is preceded by a Memorandum of Explanation, and we must attend to its contents. It asserted that the old Reich was a creation of Bismarck, institutionally equipped for the hegemony of Prussia. It was founded upon the 'hegemonial Particularism' of Prussia, and therefore was obliged to concede to the Particularism of the other states. The symbol of its spirit was the Bundesrat, and the effect of its operation, continual friction. The foundation of the new Ger-

<sup>1</sup> Cf. *Reichsanzeiger*, 20 Jan. 1919; Purlitz, pp. 15–31; *Staat, Recht und Freiheit*, by Hugo Preusz (1926), p. 368 ff.

man Republic must be an entirely unitary popular state founded on the right of self-determination of the *German Nation in its aggregate*; no representatives of the people were to take the place of the dynasties, but this was to be occupied by 'the national self-consciousness of a self-organized state-people'. The fundamental tone of the whole memorandum was 'Be One, for you are One!' The primary basis of the German people's political system was not the states in a Union—but the historical fact of its political Unity. There is only a German nation; there is no Prussian, Bavarian, Lippian, or Reuszian nation. The obstacle to the recognition of this had departed with the dynasties. It had to be admitted that a separatist spirit was a part of the German character. It showed itself in the hostility to centralization, in the attachment to the peculiarities of its countries and races, in the pursuit of cultural variety, and placed special value upon self-government in commune and state.<sup>1</sup> This tendency ought not to be obstructed; it ought rather to be encouraged. But—the states and the state frontiers had in reality nothing to do with this natural phenomenon. What were they? Accidental arrangements of a purely dynastic family policy, everywhere capriciously intersecting the natural connexions of land and race, dividing the things which belonged together, and joining things alien to each other. They had always destroyed the possibility of German unity. Now let them be mastered! The smaller states must join with their neighbours. Yet Prussia is the most difficult question. Better were it if there were no need to answer it; but not to answer it is to ruin the new Constitution. 'For the continuance of a unitary Republic of 40,000,000 inhabitants, within a Republic organized and independent of 70,000,000 is clearly a constitutional, political and economic impossibility.' Its unity is impossible to contemplate: for either there must result a continuous battle between Prussia and the Reich, or Prussian hegemony. To divide Prussia is not to divide an inwardly united entity: it is only to loosen bonds which were forced by one part upon others. Prussia was the incomplete and incompletable German state. Its purpose had been fulfilled in taking the rest so far towards a United Germany. Now new methods were required to complete the task. If Prussian hegemony disappeared, Germany's international situation would improve, Particularist forces everywhere would be weakened. 'National German unity must weaken artificial dynastic Prussian unity.' Then, the countries, the races, and the cultural and economic qualities in Prussia can find their direct expression in the Reich, their equality with the other states; while the Middle and North German small states can join together as prac-

<sup>1</sup> Preusz uses the academic terms '*Kommunale and landschaftliche Verbände* (communal and larger territorial association) in the real style of Gierke and the *Genossenschaft School*.

ticable commonwealths, and the Reich be better able to balance agricultural East and industrial West.

In such a scheme of territorial reorganization, the states would enjoy the highest possible amount of local self-government, which hitherto had been too large in Prussia, but too little in the smaller states. The Reich must have every function which falls naturally to the organ of a 'national community'. In finance, especially owing to the burdens of the War, the priority of the Reich was indispensable. Yet wherever possible, in law and in administration, 'the peculiarity and private life of the local communities must be given free room in which their activity might be fruitful and in correspondence with their sentiments'. Hence, while some powers were exclusively in the hands of the Reich, others were to be concurrently exercised by States and Reich.

**Separatism Cries Halt!** The Draft evoked an indignant outcry. The Socialist rulers of Bavaria were anxious to make use of the widest possible powers for the realization of their social policies, while the *bourgeoisie* desired separate and more favoured treatment of Bavaria at the Peace Conference. Non-Socialist Bavarians created the Bavarian People's Party to secure the economic and financial independence of their state.<sup>1</sup> Baden and Saxony resented central direction, especially since this was carried out by radical elements in Berlin. On 28 December, 1918, at a conference of the governments of Bavaria, Würtemberg, Baden and Hesse to urge forward the settlement of peace and the establishment of a National Assembly, declarations were made in favour of the unity of the Reich, against secession, yet Germany was warned of the 'ever more clearly perceptible disadvantage of an exclusively central government, which would repress our state governments to the conditions of subordinate provincial authorities'. A federal organ was considered essential.

On the 20 January, 1919, the storm was let loose. Each State was prepared to see desirable territorial reorganization effected—but outside its own frontiers; most were prepared for a carving up of Prussia, except Prussians. All desired centralization but not at their cost.<sup>2</sup> The result was a number of important concessions to the anti-unitarists.<sup>3</sup> (1) The territorial reorganization of the states was made more difficult; but the states' attempt to make it impossible, by leaving the Article as a mere permissive right of the states, and taking away from it all compulsion, was foiled. (2) The provisions regarding the form of government in the states were modified by

<sup>1</sup> Salomon, *Die Wahlprogramme*, III.

<sup>2</sup> For a daily commentary upon the events and controversies, Purlitz, *Geschichtskalender*, should be consulted. Cf. also Becker, *Föderalistische Tendenzen im deutschen Staatsleben seit dem Umsturz der Bismarckischen Verfassung* (Breslau, 1928).

<sup>3</sup> Cf. Triepel, *Quellensammlung*, p. 29; Preusz, *Stenographische Bericht der deutschen Nationalversammlung*, 1919, edited by Heilfron, I, 90-1. Henceforward cited as *Heilfron*.

omission of reference to local government, local police, and Parliamentary Committees of Investigation. (3) The clause relating to direct control over state officials concerned with the execution of Reich laws was omitted, and the whole process of Reich superintendence approximated to the indirect control of the old system.<sup>1</sup> (4) The Bicameral Parliament of the Preusz Project was jettisoned, in favour of a Reichstag, consisting of directly elected members, and a *Reichsrat* by its side (instead of Preusz's *Chamber of States*) with greater powers than that body, and with the representation redressed in favour of the smaller states.<sup>2</sup> Yet the Central Government was not greatly embarrassed by this arrangement.<sup>3</sup> (5) The State Committee attempted, but *unsuccessfully*, to maintain the representation in the Reichsrat on its old basis by an amalgamation of principles of representation, but only for states with over a million inhabitants; since the new principle of representation according to population threatened them with lesser weight, and at any rate, an alteration of their former strength. Prussia limited to one-third in such a system would have been peculiarly placed in the event of territorial reorganization of other states. The Reserved Rights of certain states were reintroduced.<sup>4</sup> Thus there was a notable modification in a direction contrary to unity, but in these points only. The rest of the Draft made for unity. It is worth observing that in the Draft which went before the State Committee there was inserted a preamble very reminiscent of the Preamble to the American Constitution, and emphasizing the Unity of the people as the basis of a new Federation.<sup>5</sup>

**Towards a Unitary State.** The Draft was introduced into the National Assembly, and consigned to the Constitutional Committee. Now the party composition of the Assembly and therefore of the Committee, governed the treatment the Draft received, and on the whole this contributed materially to reducing the state-rights elements, and to re-emphasizing the unitary character of the Constitution.<sup>6</sup> The legislative powers of the Reich were increased, but only after the Constitutional Committee of the Assembly had repaired the ravages of the State Committee which destroyed Preusz's plans for a large field of exclusive legislative and administrative Federal powers.

<sup>1</sup> Cf. Art. 14.

<sup>2</sup> Art. 18. When Preuss introduced the project into the assembly he said that so far there had only been a battle of outposts, but an obstinate battle.

<sup>3</sup> Preusz, p. 412.

<sup>4</sup> Arts. 5, 80, 87, 90, 102, 103, 116, 117, 118.

<sup>5</sup> Cf. Preusz, *Kommentar*; *Reich und Länder*, edited by Anschütz.

<sup>6</sup> The majority and Independent Socialists sought for the unitary state largely to implement their social and economic programme; the Democratic Party harked back to the traditions of liberalism of 1848, and sought the 'decentralized unitary state', the Centre Party was divided in its attitude to the Prussian problem, but was generally for greater unity than under the old constitution (with the exception of the Bavarian People's Party); the German People's Party were more separatist than the Democrats, but inclined towards unification. Only the Bavarian People's Party and the German Nationals looked backwards, and each for different reasons.

**Territorial Reorganization.** Article 18, on the reorganization of the states, caused bitter controversy. Its form, Article 15, as reported from the Constitutional Committee, was the victorious result of the centralizers, after a tremendous and close battle.<sup>1</sup> In this battle Prussian fears of division had again been vehemently expressed; but the general common sense of the Committee had been won by the assent given to the general proposition by the small states, and the arguments of Preusz, that territorial reorganization would take place gradually and for proven cause, and that this would be promoted by a special administrative department for the study and encouragement of beneficial reforms. In fact, before the Second Reading in Committee, owing to the protests of the Middle States and of Prussia, the government were obliged to amend the Article by (1) making reorganization depend upon the preliminary assent of the territories concerned, and (2) requiring a constitutional amendment, instead of an ordinary law, to overcome the refusal of such assent. Preusz also comforted himself that, in any case, in difficult reorganizations, public opinion would be so strong that there would be a two-thirds majority in favour of the Reichstag, or a majority in a popular referendum.<sup>2</sup>

In the Full Assembly the Article, now as No. 18, came under cross-fire: the Conservatives absolutely denied the right of territorial reorganization without the assent of the states concerned, the government coalition asserted the right of the Reich to produce a reorganization against the will of the states by simple law. A complicated compromise was concluded after difficult negotiations, but it could not endure, for it had excluded the power of the Reich to take the initiative in reorganization when the states refused to budge, and too many other obstacles were erected in the path of reorganization, as perusal of the Article amply shows. A fresh compromise had to be made on the Third Reading<sup>3</sup>—on the whole very much in the favour of the Central Authority.

We will consider its terms and operation presently. Enough here to say with Anschütz and Poetzsch: 'The victory of the idea of Unity over the territorial supremacy of the member-states is patent'.<sup>4</sup> And this is only one symptom of the general change of nature of German Federation in 1919.

<sup>1</sup> Cf. *Bericht und Protokoll*, p. 43. Here, Professor Beyerle, of München, of the Centre Party and a strong supporter of Bavarian rights, attempted to secure the continuance of reserved rights. The only argument of substance seems to me to be his insistence on the strong sentiment of Bavarian people in their favour, especially in the matter of the army. There is no doubt from the speeches of this and other Bavarian representatives, that national pride was at the basis of the attempt to maintain separate rights. It was attempted to raise the plea that the reserved rights were owned by treaty whose sanctity must be preserved.

<sup>2</sup> Preusz: 'In order to avoid a protest of almost every German state against the Federal Constitution I recommend the inclusion of the term "a constitutional amendment" in spite of all opposing considerations.'—*Protokoll*, pp. 430, 431.

<sup>3</sup> *Heilfron*, p. 2142 ff.

<sup>4</sup> Anschütz, *Die Verfassung*, p. 205.

Let us now consider its other aspects, and in particular :

1. The Presidency.
2. Legislative Powers.
3. Administrative Powers.
4. The Judiciary.
5. Representation of the States and Reorganization of their territory.
6. Finance.
7. Form of the State Governments.
8. Survey, and problems.

**The Presidency.** Instead of the Presidency being perpetually vested in the Prussian dynasty, it is open to any German citizen ; it is elective not hereditary. This was a heavy blow at the moral authority of Prussia in the Federation. Nor is the Chancellor any longer the creature of the President, but the creature of the Reichstag,<sup>1</sup> a body which has taken over the sovereign position hitherto occupied by the Bundesrat.

**Legislative Powers.** We have already observed that the Reserved Rights were abolished ; hence the new Constitution divides out the plenitude of state powers, without reservations special to any particular state. The jurisprudence of the old Constitution held that the Reich possessed only the powers expressly and indubitably transferred to it, while the rest *a contrario* belonged to the states ; and though this doctrine was pronounced as inapplicable to the new Constitution, its contrary, that silence favours the competence of the Reich, has not been admitted. Hence the Reich has only the powers expressly given to it, and any others which can be proved to follow from it closely, although there is no 'necessary and proper' clause in the German, as in the American, Constitution.

The competence of the Federal authority is immensely extended, until the independent activity of the states is almost entirely at its mercy—legally. Firstly, both the Reich and the States are subject to the *Fundamental Rights* of the Second Part of the Constitution, and many of these are regulated by Federal law, for example, administrative jurisdiction, the law of property, and so on. Secondly, the Federation receives powers of two kinds, Exclusive and Concurrent, and both make lists of formidable scope,<sup>2</sup> so intricate, also, that

<sup>1</sup> Cf. Chapters on the Executive, *infra*.

<sup>2</sup> By Art. 6 : 'The Federal Government has sole legislative power as regards : Foreign relations ; colonial affairs ; nationality, right of domicile, immigration, emigration and extradition ; military organization ; the monetary system ; the customs department, as well as uniformity in the sphere of customs and trade, and freedom of commercial intercourse ; the postal and telegraph services, including the telephone service.'

By Art. 7 : 'The Federal Government has legislative power as regards : Civic rights ; Penal Power ; Judicial procedure, including the carrying out of sentences, as well as official co-operation between authorities ; the passport office and the police



there is less clarity of distinction between Federal and State functions in this than in any other Federal Constitution, and this largely through the Concurrent Powers. These are exercisable by the Reich at its discretion, and until it regulates any subject within its competence, state law is valid, but when the Reich legislates state law can only be passed within its terms and in consonance therewith.<sup>1</sup> If the Reich law is withdrawn the state recovers its power to legislate.<sup>2</sup> The Concurrent Power to legislate falls into two classes: Free and Conditional. In the first class are the powers enumerated in Article 7, in which the Reich is free to legislate as it wishes, and as it can, given the political conditions. In the conditional set of powers, in Articles 9 and 10, the powers of the Reich are limited: in Article 9 by the terms, 'where there is need for the issue of uniform regulations the Reich has legislative power as regards the promotion of social welfare<sup>3</sup> and the maintenance of public order and safety', and more particularly in Article 10, where the Reich is given the power, by law, to establish 'general rules' (*Grundsätze*) on a certain number of subjects.<sup>4</sup>

Now, whether the Reich uses its discretion properly or not, as permitted by Article 9, is not reviewable by any court of law.<sup>5</sup> These powers are very wide indeed, and Anschütz suggests that they were inserted in the Constitution as the nearest possible compensation for

supervision of foreigners; the poor-law system and the provision for travellers; the press, trades-unions and the right of assembly; the population question, and the care of motherhood, infants, children and young persons; the health and veterinary departments, and the protection of plants against disease and damage from pests; labour laws, the insurance and protection of the workers and employees, together with labour bureaux; the organization of competent representation for the Federal territory; the care of all who took part in the War, and of their dependants; the law of expropriation; the formation of associations for dealing with natural resources and economic undertakings, as well as the production, preparation, distribution and determination of prices of economic commodities for common use; commerce, the system of weights and measures, the issue of paper money, banking affairs and the system of exchange; traffic in foodstuffs and luxuries, as well as in articles of daily necessity; industry and mining; insurance matters; navigation, deep sea and coastal fishery; railways, inland waterways, motor traffic by land, water and air, as well as the construction of high-roads, so far as this is concerned with general traffic and home defence, theatres and cinemas.'

By Art. 8: 'Further, the Federal Government has legislative power as regards taxes and other sources of revenue, in so far as they are claimed wholly or in part for Federal purposes. Where the Federal Government demands taxes or other sources of revenue hitherto appertaining to the various States, it must take into consideration the maintenance of the vitality of those States.'

<sup>1</sup> Cf. also Art. 12.

<sup>2</sup> Meyer-Anschütz, p. 715 ff.; Anschütz, op. cit., Art. 13.

<sup>3</sup> Foreign Office translation gives 'sanitary'.

<sup>4</sup> Art. 10 includes: The rights and duties of religious societies; public instruction, including universities, and the department of scientific literature; the rights of the officials of all public corporations; the land laws, the distribution of land, questions regarding colonization settlements, the tenure of landed property, the housing question and the distribution of the population; questions regarding burial.

<sup>5</sup> Anschütz, Art. 9; Triepel, *Streitigkeiten zwischen Reich und Ländern* (1923), p. 100; Lassar, *Handbuch des deutschen Staatsrechts*, I, p. 307.

the non-inclusion of the power to extend Federal competence by an ordinary, and not a constitutional, law. It would, in fact, require exceptional conditions for the powers to be at all widely applied; Opposition groups could easily obstruct such an encroachment upon the sphere of the states. As regards the 'general rules' or 'normative' legislation of the Reich, the intention is that the Reich limit itself to laying down 'general, guiding clauses, main lines, the detailed application of which, their elaboration in special points, can be capably and desirably undertaken by the individual states, especially from the standpoint of their adaptation to the special conditions of the various states'.<sup>1</sup> However, law made in this way by the Reich is sound and binding upon citizens, as well as controlling principles for the Reich and the States as entities, in spite of the protests of Prussia and Bavaria against such an interpretation.<sup>2</sup> The Constitution further provides the Reich with a special veto over state 'laws regarding the socialization (*Vergesellschaftung*) of natural resources and economic undertakings and the production, preparation, distribution, and price-fixing of economic commodities for the community's use' so long as the welfare of the community is affected.

It is clear that the hand of the Reich is everywhere, and this in the more fundamental of state activities. Economically, culturally, in her representative and administrative institutions, in the foundations of the educational system, in the matter of general civic rights, Germany is one, or far on the way to becoming one; and the battle provoked by the division of powers is, in theory, between the conception of the Reich as a Federation and the Reich as a Unitary State with decentralization to Regions.

Now, as we shall show presently, the *Reichsrat* is no longer an authority which can frustrate the Reichstag on behalf of the states and their competence, and, therefore, the centralizing forces continue to exert their influence—especially are the nation-wide parties and the great industrial, commercial, financial and other associations the protagonists of central government. In Foreign and Military and Naval affairs, and Transport, in Social Welfare and Labour Law, in the Regulation of Industry and Commerce, in Agriculture, and even in Religion and Education, the Reich has undertaken far-reaching legislation, and will, without doubt, proceed much further.

Doubts or disputes whether a regulation under state law is compatible with Reich law are decided by the Supreme Court of State at the suit of the competent Reich or State central department. This is very different from the situation under the previous constitution, since no court was then entrusted with a direct decision on the com-

<sup>1</sup> Anschütz, p. 60.

<sup>2</sup> Cf. Poetzsch, *Handkommentar*, p. 46; Stier Somlo, I, 387, and Prussian *Oberverwaltungsgericht*, 24 Feb. 1925.

patibility of state with Federal legislation: the ordinary courts determined this *indirectly* as an incident of a challenge to the validity of a rule. Now there is a direct challenge and a special court.

**Administrative Competence.** The Articles which govern the power of the Reich to carry out its own laws are principally 14, 15, 16 and 77; and they attempt to combine Federal strength with considerable flexibility necessitated by the force of separatist sentiment and consecrated by the law and habits of the old Constitution. Let us consider the first three articles. They say that Federal Statutes shall be carried into execution by the state authorities, unless these same statutes decree otherwise; but that the Federal government *superintends* the affairs which derive from its legislative power. It should be noted that under the old Constitution the power of superintendence where no law had been passed was disputed; but jurists now hold that the history of the present Article proves clearly that the Reich may superintend anything within its competence whether it has legislated or not.<sup>1</sup> Everything, of course, turns upon the machinery of superintendence ascribed to the Reich. This is roughly indicated in Article 15:<sup>2</sup>

‘In so far as the Federal Laws are exercisable by the state authorities, *the Reich can issue general instructions*. The Reich is empowered to send *commissaries to the state central departments* and with their agreement to the subordinate authorities. The State governments are obliged, at the request of the Reich government, to amend any defects which have become apparent in the execution of Reich laws. In the case of differences of opinion the Reich government as well as the state government can call for the decision of the Supreme Court of State, unless some other court has been provided for by Reich law.’

Quite a different system has replaced the previous four methods of Kaiser and Bundesrat. Control is exercised by the Reich Cabinet operating through the Departments and their inspectors, and disputes are settled not by a body, like the Bundesrat, founded to maintain state independence, but by a Court appointable mainly by the Central authority. How far this method of superintendence will be more effective than the old depends upon two things: the personal nature of the Court to settle disputes, and the extent to which the Reich has the power of direct contact with the inferior departments. The first may be confidently expected to subserve the purposes of Federal administration. The second has given rise to controversies not calculated to strengthen Federal superintendence. Anschütz, for example, holds that there is superintendence as regards the state governments only, not as regards the servants of the state govern-

<sup>1</sup> Cf. Triepel, *Streitigkeiten*, p. 58; Anschütz, p. 74; and see importantly *Ber. und Prot.*, p. 80 ff.

<sup>2</sup> Cf. Rudolf Kohn, *Die Rechtsaufsicht über die Länder* (1921); and Anschütz, *Handbuch des deutschen Staatsrecht*, I, p. 363 ff.

ments; <sup>1</sup> while Triepel and Giese hold that the sentence regarding 'general instructions to the state authorities', does not specify which, the higher or the subordinate, and therefore that the Reich may act directly upon any authority it chooses.<sup>2</sup> Preusz was of the opinion held by Anschütz.<sup>3</sup>

Practice has developed in three directions: the inclusion of detailed rules in various Reich statutes, the appointment of commissaries, and the establishment of authorities regularly to co-operate with and superintend the state departments. The Financial Laws, the Civil Service Laws, the laws on Unemployment Exchanges and others, lay down general rules within which the state governments must act, or fix upon some special authority (like the Reichsrat or a special arbitration court) for the settlement of certain quasi-legislative matters like municipal loans or civil servants' salaries, or they associate the Reich Departments directly with the state departments in the administration of certain subjects, e.g. in the case of social welfare, or require regular information from the states. The appointment of commissaries to inspect state administration has been rare and has only occurred on exceptional occasions when civil disturbances have occurred in a state, or when, as in Saxony, in 1924, complaints were made about the administration of unemployment relief—but even this was due rather to a dispute on the interpretation of the statute than to incompetent execution. The Reich directly superintends in many cases, e.g. electricity, railways, canals; and, in the case of the regulation of the labour market and unemployment insurance and factory legislation, the entire administration has gone over to the Reich.

The administrative power of the Reich, in short, seems to have been exercised, either in the way, well known under the old constitution, of applications to the state government, or of the judicial settlement of disputes by certain courts, or the entire assumption of administrative power by the Reich. The judicial settlement of disputes (Art. 13, para. 2) has operated through a special branch of the *Reichsgericht*,<sup>4</sup> and through the *Reichsfinanzhof* in about a score of cases.

The power to assume detailed administrative responsibility is given to the Reichstag by Article 77: 'The general administrative rules needed to execute the Reich statutes are made by the Reich Government, unless the law otherwise determines. The Reich Government needs the assent of the Reichsrat, if the execution of Reich statutes belongs to the State authorities.' This power of the Reich has been used for the creation or extension of Reich Departments with their

<sup>1</sup> Anschütz, p. 76. We have already commented upon the new terms, indirect and 'pervasive' or 'permeating' supervision—*verbandsaufsicht* and *durchgreifende aufsicht*, as treated by Anschütz.

<sup>2</sup> Triepel, p. 85; Giese, *Kommentar*, No. 2, Art. 15. <sup>3</sup> *Bericht und Protokoll*, p. 429.

<sup>4</sup> Cf. RGBl., 1920, p. 510. Gesetz zur Ausführung des art. 13, abs. 2 der Verfassung (8 April 1920).

own local organization as in Social Welfare, the Coal Commission, Disarmament, Potato, Wheat and Sugar Departments, Labour Exchange Department, Juvenile Welfare Bureau, and Emigration Department. Various of the activities of the Ministry for Economic Affairs and Ministry of Labour ramify through the Federation in the same way. The administrative rules have poured fast and furious from these departments.

All this has, of course, been encouraged by the obvious necessities of each particular subject of administration for which large-scale organization and uniformity are essential; it has been required by national financial stringency, and enforced by the financial supremacy of the central government and its control over certain funds like those for the promotion of education.<sup>1</sup> This, however, does not completely describe the extent to which the administrative power of the Centre has increased. A number of subjects come directly and completely under the Reich. These are foreign affairs, military affairs, railways, and posts, telegraphs, and customs.

Thus the distribution of administrative powers is very complicated, the location of administrative responsibility being in most cases (excepting for Foreign Affairs) not determinable without close inspection of the various Reich laws relating to the subject and the combination of powers given to the Reich by the Constitution. This complexity is increased by two further principles: that which permits the states to transfer administrative competence over powers within their own field to the Reich,<sup>2</sup> and Article 16, which requires that 'officials entrusted with the direct Reich administration in the states shall be as a rule citizens of those states'.<sup>3</sup> The matter is even further complicated by the statutory devolution of administrative powers to the Reichsrat which we shall discuss in a moment.

**The Administration of Justice.** In the distribution of judicial powers the new Constitution, Section VII, and Articles 102 to 108, made little advance upon the old. A weak attempt to take over completely the judicial powers of the ordinary courts was heavily defeated by the representatives of all states, and the Article 103 that 'the ordinary administration of justice is exercised by the Reich Supreme Court and the Courts of the States', was intended to continue the old system.<sup>4</sup>

Two novelties appear. First, the establishment *by the Constitution* (Art. 107) of Administrative Courts: 'In the Reich and the states administrative courts must be established, as regulated by law, for the protection of the citizen against regulations and decrees of the administrative authorities.' The significance of this article is

<sup>1</sup> Cf. Nawiasky, *Grundprobleme der Reichsverfassung*; Lassar, *Reichseigene Verwaltung unter der Weimarer Verfassung, Jahrbuch des Öffentlichen Rechts*, XIV (1926).

<sup>2</sup> Accomplished by particular statutes.

<sup>3</sup> Cf. Lassar, *op. cit.*

<sup>4</sup> *Bericht und Protokoll*, p. 353.

explained in the Chapter on Legal Remedies against Public Administration.

The second is Article 108: 'A Court of State (*Staatsgerichtshof*) shall be established by a Reich statute'. This is a tribunal for the trial of constitutional issues of the first rank, and these are:

(a) Impeachment by the Reichstag of the Reich President, the Imperial Chancellor and Reich Ministers for criminal violation of the Constitution or statutes of the Reich. This follows from Article 59 of the Constitution according to which the resolution for impeachment must be moved by at least 100 members, and needs the assent of a majority as for a constitutional amendment, that is, a two-thirds majority in a quorum of two-thirds of the membership of the House: also similar impeachments in the states if they declare the Court competent by statute.

(b) Differences of opinion regarding maladministration of Reich statutes by the states, suit being made by either Reich or state government, providing no other court is designated for the purpose by the statute. This from Article 15 of the Constitution.

(c) Disputes regarding property in cases arising out of territorial reorganization of the states (Art. 18, Clause 7, Constitution).

(d) Constitutional conflicts within a state in which no Court exists for their settlement; <sup>1</sup> also conflicts of a non-private nature between states or between the Reich and a state <sup>2</sup> (Art. 19, Constitution).

(e) The rights of the Reich in disputes about its powers of expropriation and its authority regarding the railway system; the conditions of transfer of the post and telegraph system, the state railways, canals and *seeziechen*, from the states which possessed them hitherto (Arts. 90, 170 and 171); and differences of opinion arising out of the treaties relating to the transfer of these and similar institutions.

The Constitutional Article was followed by the Law relating to the Court of State of July, 1921,<sup>3</sup> which embodied the list of powers we have already indicated, and dealt with the composition of the Court for various classes of cases.

This court had no model in the old Constitution, if we except the power of the Bundesrat to lend its good offices for the settlement of constitutional conflicts within such states as had no appropriate organ in their constitution.<sup>4</sup> Other disputes, as between Reich and States, could, and did, also come before the Bundesrat. However, no court of impeachment for Ministers existed. In the creation of the new Constitution the principle present in most modern written constitutions, and in the conventions of the British Constitution, of *legal* as well as *political* responsibility of Ministers and President, was adopted, not, as we amply show in the chapter on the Executive, that it is of everyday importance.

The mixture of functions assigned to this Court necessitates a

<sup>1</sup> These are not disputes arising merely out of *any* violation of the Constitution but only conflicts between Parliament and Government. Cf. Lammers, *Gesetz über den Staatsgerichtshof*, p. 73, note 7.

<sup>2</sup> Cf. esp. Triepel, *Streitigkeiten* (cited above).

<sup>3</sup> *Gesetz über den Staatsgerichtshof*, 9 July (RGBl., p. 905).

<sup>4</sup> Constitution of 1871, Art. 76.

variable composition. According as it applies itself to one or the other of its subjects,<sup>1</sup> it includes matters which are predominantly of parliamentary importance, and others the nature of which suggests their classification within a court of administrative law. Hence the Court bifurcates: for impeachments it is part of the Supreme Court, for all other matters it is part of this Court only until a Reich Administrative Court is created (and this has so far not been established) and its composition appropriately changes.<sup>2</sup>

The power of the Court to settle disputes between Federation and State is an interesting and important innovation. Under the old Constitution the states were sometimes judged by the Reich without appeal to a properly constituted court of justice, or the Reich was successfully defied, since appeal to the Bundesrat was an appeal to a political body the members of which had a personal interest in the result. The character of the new Federation made such a method impossible. A central authority to guard the spirit of the Constitution was imposed by the facts of the situation. To whose advantage this arrangement will redound is yet to be seen—manifestly, if we are to be guided by the experience of the Supreme Courts of the U.S.A., of Australia and Canada, it depends upon the mentality of the judges and the accessibility thereto of the facts of evolving civilization. In this court the Constitution has added, to its statesmen in Parliament and the Cabinet, one more group entrusted with high decisions which are couched in judicial form, but which, without any doubt, are super-legislative, and the function is not exercisable, as in the U.S.A. Supreme Court, by the roundabout method of judicial review, but by the direct claim of state upon the Reich or the Reich upon a state.

<sup>1</sup> Cf. Lammers, *op. cit.*, p. 17, note 6.

<sup>2</sup> In the first case (Arts. 3-5) the Court is composed of the President of the Supreme Court as Chairman, and one member each of the Prussian Administrative Court, the Bavarian Supreme Court, and the Hanseatic Supreme Court, a German barrister, and ten others. The judicial members are chosen for the length of their service in their own court by the presiding council of that court, the barrister is chosen by the presiding committee of the Barristers' Council at the Supreme Court for the duration of his membership of the German bar, the other ten are elected five by the Reichstag and five by the Reichsrat at each new legislature, any German over thirty being eligible except members of the Government, of the Reichstag, the Reichsrat, the Reichswirtschaftsrat, or State Governments, Parliaments or Senates. Then there is a mixture of judicial and lay elements and the exclusion of any who might be in the position either of complainants or defendants. Procedure, of course, follows closely that of the ordinary criminal courts (Art. 6): the Court has full powers over witnesses, discovery and production of evidence. The Court, finding a person guilty, may declare that he has forfeited his office. Pardon is possible only with the assent of the Reichstag. In the Second Class of cases—all except those under (a)—there are variations, the Court is composed of the President of the Reich Administrative Court, as Chairman, three Supreme Court councillors, and three councillors of the Reich Administrative Courts, for (b), (c) and (d); and for cases under (e), the President of the Reich Administrative Court, no Chairman, one Councillor each from the Reich Supreme Court and the Reich Administrative Court, and four others chosen by the Reichstag and the Reichsrat.

Is such a wide power as this seems to predict desired in Germany? <sup>1</sup> Opinion is divided; some wish it to be narrowly interpreted,<sup>2</sup> others cannot avoid the thesis of a liberal interpretation;<sup>3</sup> the most authoritative, as the most complex, opinion is Triepel's, to whose work on the subject the student must be referred; but one comment of his is of such enlightening interest that it must be reproduced:

'With the discarding of the Kaisership, the Bundesrat and all the other institutions which were at once the supports of Prussian hegemony and barricades against attacks upon Prussia's position as a great power, the situation altered at one blow. (The situation had been that in the Confederation of 1866 and the Empire of 1871 Prussia had rejected any vesting of the settlement of disputes in a neutral court.) Prussia is forced into a position of defencelessness, and is even threatened in its character as a state. It must look to its security. It seeks the establishment of a Court of State. Thus Prussia is forced by need, in an important question, to advocacy of a policy of separatist defence against the operations of a limitless unitarism.'<sup>4</sup>

**Representation of the States.** The tendencies towards unitarism were strong, but not strong enough entirely to overcome the demands for a body especially to represent the states and to obtain for them a power to influence the creation of federal policy. Preusz's original proposal for a *Staatenhaus* based upon representatives chosen by the state legislatures, to act freely, not being bound by instructions, and for councils of state representatives to advise the Reich Departments on legislative projects and administrative rules, was rejected as destructive of state individuality and as a threat of party domination of the Second Chamber, in favour of a more substantial guarantee of state significance—that is, a real, if weak, body representative of state governments. The reporter of the draft sent by the Constitutional Committee (in which mighty battles had been fought) to the full Assembly said,<sup>5</sup>

'The Committee has accepted the constitution of the Reichsrat to maintain the organic connexion of the Reich with the individual states, and thus it has expressed the sense of historical evolution and the living necessities of the Federation. This Reichsrat is, however, not intended to be either a First or a Second Chamber, or a Parliament or a House of States,<sup>6</sup> but a body to represent the German states in the legislation and administration of the Reich. The Reichsrat—recognized by all parties of the National Assembly as a necessary and useful organ—is at once an institution of the Reich as well as an organ of the totality of states with a constitutionally complete double status.'

Before we turn to consider the composition and power of this body,

<sup>1</sup> The work of the Court up to 1924 is summarized in Poetzsch, *Vom Staatsleben unter der Weimarer Verfassung, Jahrbuch des Öffentlichen Rechts*, XIII (1925), 243–8.

<sup>2</sup> Wittmayer, *Die Weimarer Verfassung*, p. 245 ff.

<sup>3</sup> Poetzsch, *Handkommentar*, Art. 108.

<sup>4</sup> Triepel, *Streitigkeiten*, p. 117.

<sup>5</sup> Conrad Haussmann, Second Reading, 2 July 1919.

<sup>6</sup> i.e. no doubt, equal in power and operating with a single view to benefit the states.



a few words may be said in general about its political position in comparison with the Bundesrat under the old Constitution.

(a) Though strong, it is distinctly inferior to the Reichstag—which emanates from popular election over the whole territory of the Reich—in political authority and constitutional power. The centres of importance lie in the Government and the Reichstag whose confidence is necessary to its existence. Under the old system the Bundesrat was predominant.

(b) The Reichsrat is not the centre of the activity of an Imperial Chancellor working without substantial responsibility to any one but the Emperor, but it is dominated by the Government, which, again, is a creature of the Reichstag.

(c) It has not the wide power to issue administrative rules and to arbitrate in disputes between the Reich and the states.

(d) It is not the representative of monarchs and princes but of Governments (in the states) popularly supported and controlled.

Very clearly it mirrors the pronounced rise of unitarism; and its character is perhaps best expressed by the dictum that it is a 'body representing the states attached to the Federation for Federal purposes and not at all an organization of the states for state purposes'.<sup>1</sup>

#### Composition. Article 61 says:

'In the Reichsrat every state has at least one vote. The larger states have one vote for each 700,000 inhabitants. A surplus of at least 350,000 inhabitants is taken as equivalent to 700,000. No country may be represented by more than two-fifths of all the votes. . . . The distribution of votes is regulated by the Reichsrat after every general census.'

Until March, 1921, this article read:

'The larger states . . . have one vote per million inhabitants. A surplus which at least equals the population of the smallest state is taken as equivalent to a full million.'

The amendment<sup>2</sup> was made in order to increase Prussia's votes so that the division of one-half of them among her provinces would give them exactly one vote each. This we explain presently.

Preusz's attempt to group the smallest states and give them combined representation was foiled, and the disputants gradually worked back to the graduation of the old system, except that its basis was altered: instead of being a permanent arrangement, which stereotyped the results of the movement for and against the federation and the varied dignity of each state, the new order made population a developing factor, the basis of present and future representation. The full significance of this is only comprehensible in the light of the fact that large territorial reforms were envisaged, and that the present movement for such reforms will certainly take progressive effect.

<sup>1</sup> Quarck, *Heilfron*, p. 1344.

<sup>2</sup> RGBl., 440, 24 March 1921.

The representation based on the latest census, of 1925, is given below,<sup>1</sup> which also serves to show how petty are some of the States—which have all the form and panoply of full-blown republican states.

The states are represented in the Reichsrat through members of their governments, and may send as many representatives as they have votes.<sup>2</sup> Now this closely follows the practice of the old Bundesrat, the delegates to which were chosen by the Government of the states, though at that time the government consisted of forces not entirely popularly controlled. However, the essential element in the previous situation is reproduced: the members of the Reichsrat are neither elected at large like American or Australian Senators, nor chosen by the members of the state legislatures as in America before 1913, but, as before, they are directly appointed by the state governments. Although the Article says that the states are represented by members of their governments, this means only that Ministers *may* be chosen, but it does not exclude representation by officials of the states, and, in fact, in most states the pressure of governmental affairs normally compels the governments to designate high officials as state representatives.<sup>3</sup> But members of the governments speak in the Reichsrat in support of their state's attitude on the more important occasions. There is still the flavour of ambassadorship about Reichsrat representation, the term *Hauptbevollmächtigter* used to distinguish the 'full plenipotentiary' from his deputies, and the title conferred upon these by many states, of 'ambassador extraordinary' (*ausserordentlichen Gesandter*), supports the illusion.

State.	Total Population.	Number of Votes.
1 1 Prussia . . . . .	38,069,631	27
2. Bavaria . . . . .	7,379,594	11
3. Saxony . . . . .	4,996,138	7
4. Württemberg . . . . .	2,579,453	4
5. Baden . . . . .	2,312,462	3
6. Thuringen . . . . .	1,609,300	2
7. Hessen . . . . .	1,347,295	2
8. Hamburg . . . . .	1,152,489	2
9. Mecklenburg-Schwerin . . . . .	674,411	1
10. Oldenburg . . . . .	545,749	1
11. Brunswick . . . . .	501,675	1
12. Anhalt . . . . .	351,485	1
13. Bremen . . . . .	338,846	1
14. Lippe . . . . .	163,577	1
15. Lübeck . . . . .	127,971	1
16. Mecklenburg-Strelitz . . . . .	110,371	1
17. Waldeck . . . . .	56,987	1
18. Schaumburg-Lippe . . . . .	48,044	1
		<hr/>
		Total 68

<sup>1</sup> These figures held good until 1 April 1929 (Union of Prussia with Waldeck). Cf. Poetzsch-Hefter, *Vom Staatsleben unter der Weimarer Verfassung, Jahrbuch des Öffentlichen Rechts*, XVII, 1929, p. 109.

<sup>2</sup> Art. 63.

<sup>3</sup> Cf. Anschütz, p. 203; Preusz, *Bericht und Protokoll*, p. 152; Held, *Der Reichsrat*, p. 23.

Under the old constitution, representatives were bound by instruction: whether they are now, legally, is a widely disputed question. Preusz attempted expressly to settle this in the negative,<sup>1</sup> but the most that could be achieved was the omission of the prohibition without, at the same time, the affirmative statement that instructions were compulsory. Hence, it is left to the states to determine; and, thus the situation closely, if not entirely, approaches the old system: the representatives are accredited by the state governments, responsible to them, and are therefore bound by instructions—and the bond is the more legally secure since it is argued by high authorities that a state cannot divest itself by statute of the right to command the actions of its representatives.<sup>2</sup> Yet others, like Giese, argue that the representatives may speak and vote in their free discretion, and their argument follows that of Preusz, that as members of the state government itself they cannot be bound, since it would be a case of the binders binding themselves. This does not square with the facts. It seems to me that where the representation is devolved to an official or other person, not an actual Minister, in a commanding position, the representative cannot avoid being bound either by the views of his colleagues, if he is a Minister, or by his superior if he is an official. It seems proper also to say, with Anschütz, Bilfinger and Held, that the instruction is a domestic concern of each state and not of the Reich. In the *Hildebrand Case*, Hildebrand, a Social Democratic Representative of Württemberg, who voted against his instructions on party grounds, was publicly reprimanded by the President of his State.<sup>3</sup>

**Prussia.** As a rule then all states cast their votes uniformly, although the constitution is silent on the subject. This arrangement which conforms to the old practice is, however, legally impossible for Prussia, for the Constitution *has attempted to serve the true cause of federation by disrupting the unity of this state*. 'However', says the Constitution (Art. 63) 'one-half of the Prussian votes are accorded to the Prussian Provincial Administrations according to Prussian statute.' The

<sup>1</sup> *Projects*, Art. 21, and *Ber. und Protokoll*, p. 446: 'The whole structure of the representation of the States rests upon just this clause: Members of the Reichsrat are not bound by instructions since those who have votes in the Reichsrat ought to be responsible ministers. If Herr Koch says that a contradiction exists when a responsible minister is in the Reichsrat and is not bound by instructions, the real truth is quite the opposite. The presupposition of responsibility for my behaviour is that I act according to my free conviction. . . . So here the voting representative of a State is responsible to his State Parliament for the way in which he casts his vote, but in order to be able to be responsible he must be able to act according to his own general political conviction.'

<sup>2</sup> Anschütz, p. 205; Bilfinger, *op. cit.*; Poetzsch-Heffter, *Handkommentar der Reichsverfassung* (3rd Ed., 1928), p. 287.

<sup>3</sup> Cf. Bilfinger, *Der Fall Hildebrand*, in *Archiv des Öffentlichen Rechts* (New Series), Vol. 8, p. 174 ff.

statute in question was passed in 1921.<sup>1</sup> Its main provisions are : that the thirteen representatives are each elected by a Provincial Committee (the ordinary executive committee of the largest local government division), that all German citizens over twenty-five are eligible. Thus there is no obvious control of the Prussian Government over the choice of these representatives. Yet the law was not unmindful of the need to reknit what the constitution had severed. For the law says (Art. 8) that in the Committees of the Reichsrat (and the committee work is exceedingly important) the vote of Prussia is cast by a representative *appointed by the Ministry*, although any of the elected members may require a preliminary discussion of the matter with the Ministry. Further, in the plenary sessions the elected members have a free vote : ' Yet the items on the agenda shall be discussed in common by the appointed and the elected members *for the purpose of producing a uniform vote.*' This is a clever device, and it is certainly not in the spirit of the constitution ; Prussia seeks for every vestige of its lost inheritance. Yet Prussia is never certain that the thirteen provincial representatives will follow the wishes of the central authority ; and, in fact, between March 1922 and December 1923, there were twenty-three important occasions when dissensions occurred,<sup>2</sup> and since then similar events have occurred in crucial matters, as for example, on the Reich School Law in 1927. This causes serious disquietude, for if thirteen votes are cast against fourteen—Prussia's influence upon the law in the Reichsrat is neutralized. This rarely happens, since some provincial representatives of the same party as the Government vote with it ; yet influence is lost.<sup>3</sup> Consequently, new devices are being explored—that Prussia's vote should be cast uniformly by means of a majority decision taken in preparatory proceedings.<sup>4</sup> But this surely is unconstitutional, and the opposition in Prussia to such a device admitted this.<sup>5</sup> Prussia is, indeed, strait-jacketed ! and only a constitutional amendment can release her. However, what

<sup>1</sup> 3 June 1921. Gesetz Sammlung, p. 379. Cf. *Preussen und seine Provinzen im Reichsrat*, by Fritz Hummel (1928), which is a very capable and painstaking study of the law and partly of the practice.

<sup>2</sup> Cf. Triepel, *Der Föderalismus und die Revision der Weimarer Reichsverfassung, Zeitschrift für Politik* (1924-5), XIV, 193 ff.

<sup>3</sup> Nawiasky, op. cit., p. 40 ff. Cf. Hummel, op. cit. (84, 85) shows that the same provinces have voted in contradiction to the Government votes to safeguard their own local economic interests (tariff law, distribution of product of beer duty, wheat production regulation, and rent law) as well as on spiritual issues. Schoppmeier (*Der Einfluss Preussens auf die Gesetzgebung des Reiches*) reports the following : Between June, 1921, and September, 1924, there were 2,394 cases of division in the Reichsrat. Of these, there were forty-nine occasions when some Prussian provinces voted against their Government. In 11 cases of the 2,394 the Prussian Government was in a minority. Of the eleven occasions four would have occurred even with a united Prussian vote. In seven cases, then, the division of the Prussian vote caused a defeat of that State.

<sup>4</sup> Cf. Poetzsch, *Preussen im Reichsrat, Deutsche Juristenzeitung*, Jan., 1926.

<sup>5</sup> Cf. Hummel, 97 ff.

Prussia cannot obtain within the constitution, or by its perforation, it is in a fair way to obtain by direct influence upon the Reich government—for, after all, it is two-thirds of the Federation!—and by informal conferences with the states outside the Reichsrat where the art of political reciprocity is carried to high, because necessary, levels.

**The Government Presides.** Prussia has not only lost power by the arrangements we have sketched but she has fallen from authority because she no longer presides as of right over the Reichsrat. The power, however, which she lost, redounds to no other of the states: the Reichsrat has been legally subordinated to the Reichstag and the Reich Government, by the vesting of the Presidency in the Federal Government, thus: 'The Reichsrat and its committees are presided over by a member of the Federal Government. The members of the latter are entitled, and, if requested, are obliged, to take part in the proceedings of the Reichsrat and its Committees. They must be heard upon their demand any time during debate.' Thus a regular and continuous reciprocal influence is made possible, and the significance of this will become the more apparent when we consider the power of the Reichsrat. The Government has no voting power, but its representatives have considerable authority in the conduct of proceedings. The Government, as well as any member of the Reichsrat, may introduce proposals.

**The Rights of the Reichsrat.** 1. The Reichsrat has the power (Art. 66) to establish its own Rules of Procedure, and this it did in November, 1919.<sup>1</sup> We shall indicate the main elements later.

2. The Reichsrat must be kept informed, by the Reich Departments, of the conduct of Reich affairs. The competent committees of the Reichsrat must be called in to counsel regarding important matters by the Departments.<sup>2</sup>

3. The Reichsrat's consent is required to administrative rules made by the Government when the execution of Reich statutes is carried out by the State authorities. The Reichsrat has been given certain administrative powers by various laws passed since 1919.

4. The Reichsrat has the right to initiate legislation, and to challenge the bills passed by the Reichstag, and must be consulted before Government bills are introduced in the Reichstag.<sup>3</sup>

1. **The Rules of Procedure** regulate the precedence of states, the conditions upon which officials who come to give explanations are permitted entry, the arrangements for the receipt of documents and the terms within which bills are to be submitted to the Reichsrat and dealt with by Committees, the conditions of public debate, the acceptance of ordinary proposals by simple majority vote, of constitutional amendments by a two-thirds majority, the relationship

<sup>1</sup> *Geschäftsordnung* (final form), 14 Dec. 1921. RGBl., p. 975.

<sup>2</sup> Art. 67.

<sup>3</sup> Art. 68.

between the Committees and the plenary assembly, the number and composition of committees (the constitution requires that however many the representatives in a Committee no state shall have more than one vote),<sup>1</sup> and the quorum for committees and Plenary Sessions, and relationships with the Departments.

**2. Information Regarding Reich Policy, and Counsel in Important Matters.** Here is a remnant of the former administrative powers of the Bundesrat, and that concession which, as we have seen, Preusz was prepared to make to particularist feeling. The first right is essential to the smooth co-operation of government and both Houses—full information is the first condition of successful exercise of the Reichsrat's powers in legislation and administrative orders. It has been found impossible to convert this right into the duty of Ministers continuously to appear before the Reichsrat, and it has come to mean only the right to get answers to its questions. The Rules of Procedure permit oral questions in every Plenary and Committee Sessions, unless written answers are desired.

The second part of the article leaves the determination of what is 'important' to the Ministers. This has operated, though not frequently, owing to the growth of the Reichsrat's administrative activity in other directions. The informal demarches to the Departments are many, and they have become of extraordinary and unexpected influence, for the Reich Departments are abnormally dependent on the States (which *administer* the law) for information.

**3. Consent to Administrative Rules.** This power is restricted to the cases where the states carry out Federal Statutes, and since this, according to Article 14, is the rule, a wide scope of actual power is vested in the Reichsrat. It compares in fact not unfavourably with the Bundesrat's, because the field of Federal power has so increased. In this matter the power of the Reichsrat is absolute, because it is not a mere power to challenge as in the case of legislation. The only remedy the Government possesses is to convert the rejected order into a law; but that has its own political difficulties. The power has been extensively used.<sup>2</sup>

The constitution amplifies the general rule by the enumeration of certain special spheres of administration in which the Reichsrat's co-operation is required in details, so, according to Article 88, regarding postal, telegraphic, and telephonic communication and the charges therefor, so, too, in railway and canal transport (Arts. 93 and 98).

The Reichsrat has been found a convenient body in which to vest certain other administrative duties; it has been made a decision-giving body in a large number of matters, in disputes regarding land registration between a state and the Reich Minister of Finance, disputes regarding resolutions of the Brandy Monopoly Council, and its Advisory

<sup>1</sup> Art. 62.

<sup>2</sup> Poetzsch (*Jahrbuch des Öff. Rechts*, 1925), p. 200 ff.

Committee, disputes whether state or municipal taxation is likely to prejudice the income and prospects of the Reich, and so on. The Reichsrat sends representatives to the Advisory Committee of the Brandy Monopoly, to the Advisory Council for the Reich Electricity Administration, to the Committee for the Reich Debt, the Reich Insurance Office, and elects and nominates members of the Reich Health Council, the Court of State and many other advisory and quasi-administrative, quasi-judicial councils.<sup>1</sup>

4. All these powers tend to increase the authority of the Reichsrat much above the level to which it fell by the discredit of the Bundesrat and all that it stood for, and the derogatory intentions of Preusz. Yet these powers would not be enough to satisfy the demands of the states for special representation unless they were merely the frills of something more important—which serves to give to them a strength they do not inherently possess—namely, legislative power, which is given by Articles 68 and 72. The most important clause, that which settles the respective authority of Reichstag and Reichsrat, and secures the certain and permanent supremacy of the former, is, '*Federal statutes are passed by the Reichstag*'. This is in strongest contrast to the former constitution in which the Bundesrat had the decisive authority; it is in strong contrast to almost every bicameral system, whether in a Federal or Unitary state. By law Reichsrat is definitely excluded from co-equality with the Reichstag, and the unitary, not the federal organ, exercises legislative sovereignty. The only position left to the Reichsrat is, then, a subsidiary one: to challenge, to provoke an appeal to the people, to warn and advise. Have the facts changed the law?

(a) 'The introduction of government bills requires the assent of the Reichsrat. If an agreement between Reich Government and Reichsrat cannot be reached, then the government can, nevertheless, introduce its bill, but must represent the objections of the Reichsrat.' This includes financial legislation, although this interpretation was challenged by the Government in 1927.<sup>2</sup> Now this clause (Art. 69, 1) leaves loopholes through which a Government may reduce the power of the Reichsrat to a minimum: no time is prescribed in the constitution for which the bill is to lie before the Reichsrat, and it may therefore be reduced to an impossible minimum; further, the Government may avoid the attentions of the Reichsrat altogether by getting a bill initiated by a private member of one of the coalition parties; and, thirdly, its representation of the Reichsrat's views may be perfunctory. The Rules of Procedure of the Reichsrat and the Rules of Procedure of the Government, make arrangements for the transmittal of bills to the Reichsrat in proper time. In fact the Government gives the

<sup>1</sup> Poetzsch (*Jahrbuch des Öff. Rechts*, 1925), p. 202.

<sup>2</sup> *Sten. Ber. (Reichstag)*, pp. 9005, 9074; 16 and 18 Feb. 1927.

Reichsrat ample time, and negotiates until it obtains the assent of the Reichsrat—for it is persuaded, almost forced, to this course by the fact that the states will be the executants of many of its policies, by the desire to secure an amicable evolution of the Federation, and by the coincidence of the party membership of some members of the Reichsrat with its own constituent groups.

A survey of all the bills before the Reichsrat since 1920 shows a very busy activity as a result of which the Government gave way in a good many cases, while in other cases it and the Reichstag overruled all objections.<sup>1</sup> Space allows us no more than to say, shortly, that the disputes occurred regarding the substance of the laws, but even more upon the Reich—State division of powers. There is no doubt that this power of the Reichsrat is compelling and in regular use, and also that it gives the States as States the opportunity to resist encroachments upon their freedom, and the establishment of new Reich services which they believe they could furnish at a cheaper cost themselves.

(b) The Reichsrat has a right of initiative: 'If the Reichsrat resolves a bill to which the Government does not consent, then the Government must introduce the bill into the Reichstag and represent the opinion of the Reichsrat.' This power does not extend to financial legislation; and though it provides the Reichsrat with the opportunity of airing its opinions and securing their representation in the Reichstag, that representation is not given to its own delegate, as in the case of the Federal Economic Council, but is left to the tender mercies of the Government. It has made very small use of the initiative, and of five cases (until the end of 1928) where the Government disagreed, only two became law, one of which was amended by the Government. This is never likely to be one of the strengths of the Reichsrat.

(c) 'The publication of a statute may be suspended for two months, if one-third of the Reichstag demands it.'<sup>2</sup> This is one of the preliminaries to a Referendum for the protection of the minority. But 'when statutes are declared urgent by the Reichstag and the Reichsrat' the Reich President may override the resolution for suspension and publish the statute. The reason for the inclusion of the Reichsrat here is obvious: so solemn an action as the suppression of a minority right must be undertaken with due deliberation, and a multitude of counsel. Article 72 was used in 1925, when the Devaluation Act was passed, a statute which engendered the bitterest controversy as it settled the value of contracts and property calculated in depreciated currency. Both Houses agreed upon the urgency of the Act.

(d) We come to the final and strongest power of the Reichsrat (Art. 74).

<sup>1</sup> The details are given in Schoppmeier, *op. cit.*

<sup>2</sup> Art. 72.



'The Reichsrat has the right to challenge a bill passed by the Reichstag. The challenge must be made within two weeks of the final division in the Reichstag to the Government, and must be supported by reasons within, at the latest, two further weeks. The law must be put before the Reichstag to be re-voted. If, then, Reichstag and Reichsrat still cannot agree, the President of the Reich may within three months order a Referendum on the subjects of disagreement. If the President does not use this power then the law counts as of no effect. If the Reichstag, by a two-thirds majority, votes against the challenge of the Reichsrat, then the President is obliged to order a referendum within three months on the bill as voted by the Reichstag.'

Let us examine this piece by piece. (1) The Reichsrat has amply used its power of challenge,<sup>1</sup> and in most cases the Reichstag has conceded its claims. (2) If the Reichstag had not surrendered, its chances of victory against the Reichsrat would, politically, have depended upon a two-thirds resolution—to bring in the people to overcome the Reichsrat. But, in a chamber composed of many groups, this is difficult to obtain; several governments, indeed, have been in a minority; and, moreover, the Reichsrat is not a non-popular assembly against which the corporate fury of the Reichstag could be summoned. Nor is that all. No government is, except in the most abnormal case, anxious to invoke a poll of the people. This, as we show in a later chapter, is bound to be managed by the parties, which would fall into Government and Opposition; and an unfavourable result would wreck the Government. Nor may we forget that Governments do not lightly undertake an electoral campaign, or, indeed, anything laborious, when in the midst of a legislative and administrative programme with all its attendant parliamentary difficulties. All this redounds to the advantage of the Reichsrat. It can suspend the bill or force a referendum. Finally (3), the President has power to decide whether a bill shall be destroyed, that is, whether he shall at once support the Reichsrat (which is an unlikely contingency) or refer to the people to settle the issue. Long before this decision has to be taken we can be sure that the Government would have arranged things, on the warning of the President, with the Reichsrat.

(e) As regards the Budget—ways and means and appropriations—the *Reichsrat has the same powers as in ordinary bills*, since the Budget is an ordinary bill in the formal sense. Here, however, the Reichsrat may exercise a *partial*, but *ultimate*, veto, for Article 85 of the Constitution says that the Reichstag may not increase or create expenditure without the assent of the Reichsrat. Or it can act simply, as in non-financial legislation, according to Article 74, and challenge the whole of the Budget. If assent is refused to an appropriation then the Finance Law is published by the President of the Reich without that

<sup>1</sup> Cf. Poetzsch, articles cited, 1925 and 1929, twelve times between April, 1920, and May, 1927. Schoppmeier, op. cit., 29: in eight cases the Reichsrat won, in only four cases was the necessary two-thirds majority obtained in the Reichstag to overcome the Reichsrat.

appropriation. The refusal of the Reichsrat may be carried out as a challenge under Article 74. Both these powers of the Reichsrat have been used, but not in vital matters.

Thus, originating in unwilling concessions to state sentiment, and in an atmosphere of suspicion, the Reichsrat was first endowed with paper powers, which looked small compared with those of the Reichstag and the Government, but the evolution of actual forces has made it a strong body. Its personal composition of distinguished officials, often connected with the Reich's own body of servants, its permanent sessions in relation to swiftly changing Governments, the practical impossibility of a two-thirds majority of the Reichstag against it, and the administrative powers of the States—their present strong line of resistance have furnished it with unexpected power. It also gains credit as an organ for the conclusion of agreements between states. Yet there are voices which call for large changes. We indicate their argument presently.

**Finance.** If the other institutions express the tendency to centralization in the German Reich, none is so potent as the financial relationship between the central authority and the states. Here the impulse towards a completely unitary political system almost achieves its goal, and it borrows extra importance from its fundamentality to all else. Under the old system the Reich had, and needed, not large revenues, since its sphere of legislative and administrative power was severely limited, and, moreover, the states had contrived to make a large part of the Reich's revenues depend upon a system of state contributions. All that is altered: the Federation has a large and easily expansible competence, and the Reparations problem and general impoverishment have inescapably imposed financial unity. This is embodied in the Constitution, which was made at a time when these considerations were most keenly felt, and in a number of laws established as necessity revealed itself fully.

The ruling articles of the Constitution are 8 and 11. Following directly upon the grant of legislative power, Article 8 says: 'Further, the Reich has legislative power over taxation and other revenues, in so far as they are claimed wholly or in part for its own purposes. If the Reich claims taxes or other revenues which hitherto belonged to the states, then it must take into consideration the maintenance of the significance of the states'. Article 11 says:

'The Reich can by statute establish principles regarding the permissibility and mode of raising state taxes, in so far as this is necessary in order to prevent (a) damage to the income or the commercial relations of the Reich, (b) double taxation, (c) charges for the use of public communications and institutions, which are excessive or impede traffic; (d) tax discrimination against imported goods compared with home produce, in commerce between the individual states and parts of states, or (e) export bounties, or (f) for the protection of important social interests.'

On the basis of these very wide powers—for the Reich obtains both freedom in its own sphere by Article 8, and a regulatory power over the sphere of the states by Article 11—a large number of laws and orders have constructed a financial system,<sup>1</sup> in which the Reich has a first call upon all revenues and the states and the local authorities a strictly limited freedom within permitted loopholes, and even here they are bound to follow procedure laid down by the Reich.

The main features of the present system are to be found in the Financial Settlement Laws (*Finanzausgleichsgesetze*). They are: (a) the States and the local authorities may raise taxes only in so far as they do not infringe the Reich Constitution and laws; (b) where the Reich claims a source of revenue the states and local authorities are thereby excluded unless a Reich statute gives permission; (c) additions to Reich taxes are leviable by the states and the local authorities in the measure permitted by Reich statute; (d) State and local taxation schemes must be submitted to the Reich Minister of Finance in order that their compatibility with Reich necessities and the constitution may be examined; (e) the Reich Financial Court (*Reichsfinanzhof*) decides differences of opinion whether state tax provisions are in consonance with Reich statutes; (f) the question of fact, whether state and local taxation is appropriate, or damages the Reich's revenues, or is incompatible with the national interests, is *decided by the Reichsrat*; (g) certain revenues are assigned to the states and municipalities; (h) certain taxes raised by the Reich are transferred altogether to the states on principles of distribution settled by the law, and the law also states the principles upon which the states shall transfer a portion to the local authorities. It is obvious that this controlling power of the Reich must seriously affect state and local activities—hence the Reich is inevitably drawn in as a judge and provider where it requires certain functions to be executed by these authorities.

Nor is this all. The change in the purpose of power has resulted in a change in the administrative arrangements to achieve it: the Reich has, instead of a small group of officials, a large body, ramifying throughout the country, having absorbed most of the state financial officials.<sup>2</sup> This was not accomplished without difficulties, since the state officials were by no means happy to transfer to a new master in Berlin, and even then the new taxes were so many and the tasks of building a fresh administrative system so heavy that the Reich was very understaffed. So, throughout the country, are thousands of Federal tax officials and customs officers, controlled by Reich Depart-

<sup>1</sup> Cf. Hensel, *Finanzausgleich im Bundesstaat*; Koch, *Finanzausgleichsgesetz* (1926), and Supplement, 1928. See for a statistical account Jessen, *Finanzbedarf und Steuern im Reich, Ländern und Gemeinden*; *Handbuch der Finanzwissenschaft*, III (1929), --67.

<sup>2</sup> Cf. Lassar, *article cited*, *Finanzverwaltung*.

ments in the states, controlled in turn by the Reich Ministry of Finance. Side by side with the state finance offices is a system of financial courts, for the settlement of disputes arising out of the tax laws. They are composed partly of professional and partly of lay members, and find their summit in the *Reichsfinanzhof*, which acts as the final arbiter of the law in financial matters and as a unified interpreter of the law for the whole Reich.<sup>1</sup>

This financial centralization is, of course, not without criticism.

**Form of the State Constitutions.** In other democratic federations, a certain minimum of uniformity in the state constitution is established by the constitution.<sup>2</sup> In Germany, the Frankfurt Constitution, democratic and influenced by American and Swiss experience, followed this principle, but the Constitution of 1871, building from

<sup>1</sup> Cf. Popitz, *Die Einrichtung der Finanzgerichte*, *Deutsche Juristische-Zeitung*, 1922, p. 276 ff.

<sup>2</sup> Cf. *Constitution of the United States*, Art. IV, Sect. 4: 'The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion, and on application of the legislature or of the executive (when the legislature cannot be convened), against domestic violence.'

Willoughby, *The Constitutional Law of the United States*, 1, p. 215, comments: '... this clause was so interpreted during reconstruction times as to give to the Federal Government for several years an almost unlimited power of control of the domestic affairs of those States that had been in rebellion against its authority'.

The legality of the old government (of Rhode Island) was recognized by the President when an appeal, arising out of Dorr's Rebellion, was made in 1841. In *Luther v. Borden* (7 How. 1 (1845)) the Supreme Court declared it could not consider the propriety of this decision.

In *Texas v. White* (7 Wall, 700) the Supreme Court construed the 'guaranty' clause of the United States Constitution to authorize Congress to establish and maintain governments in those States which had attempted secession from the Union (p. 222).

In *Minor v. Happersett* (21 Wall, 162) the Court held '... it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters'.

In 1912 (*Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U.S. 118) an attempt 'was made to obtain from the Federal Supreme Court a determination as to the compatibility of state initiative and referendum provisions with the requirements of a government republican in form'. The case arose from an objection to payment of a tax authorized by a law which had been 'initiated' by the people—and was dismissed by the Supreme Court on ground of lack of jurisdiction; the issues raised were declared to be political and therefore non-justiciable (p. 225).

The Australian Constitution (Art. 106) provides that 'the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State'.

Cf. Moore, *Constitution of the Commonwealth of Australia* (2nd Ed., 1910), p. 327: 'The Constitution does, no doubt, in some of its provisions (12 and 15) assume that the States Constitutions will retain their present shape at least to the extent of having a Governor and two Houses of Parliament, and certain alterations of State machinery might cause inconvenience in the working of the Constitution. But this does not affect the independent power of the State over its own institutions.'

The Swiss Constitution, Art. 6 (Sect. b), guarantees the Cantonal Constitutions on condition that 'they provide for the exercise of political rights according to a republican system, representative or democratic'. Cf. Fleiner, *Schweizerisches Bundesstaatsrecht* (1923), p. 57.

above, with the minimum desire to reform and the maximum desire to tap the sources of cohesion existent in the monarchical states, did not concern itself with their constitution at all. This was far from the propensities of Preusz and the surge of revolutionary feeling.

Even the opposition of the State representatives to Preusz's severe rules could not overcome the very strong feeling that unless there were some unity in political fundamentals throughout the Reich, the structure would be unsound and weak. Preusz said :<sup>1</sup>

'If the Reich builds itself, appropriately to the structure of a popular state, *from below upwards*, and if, therefore, it rests, with the whole of its inward vital processes, upon the organic foundations of its municipal and state members, then a certain normative influence of the general will of the Reich, upon the organization of the individual states and their local authorities, is indispensable. But it must be limited to the indispensable, only assuring homogeneity between the structure of the Reich and its state and municipal constituents.'

Preusz's wishes were challenged, as they still are challenged, not only by the politicians who were hostile to any interference with their own constitution, but also on the juristic ground that to prescribe the principles of a state's constitution was to destroy its statehood, its 'sovereignty'. 'A state which cannot even determine its own form ceases utterly to be a state. For its sovereignty is denied.'<sup>2</sup> This, of course, goes back to the long train of discussion about the nature of sovereignty, and statehood and federalism, some of whose characteristics we have already indicated : it insisted upon the necessity of 'original and autonomous power to organize itself' as the mark of the state.

Article 17, as finally passed, runs :

'Every state must have a free-state constitution. The representatives of the people must be elected by universal, equal, direct and secret suffrage of all men and women of Reich nationality according to principles of proportional representation. The state government requires the confidence of the body of people's representatives. The electoral principles apply to elections of local authorities also. A state law, however, may declare the qualification for a vote to be conditional upon a year's residence in the district.'

What does this mean? 'Free State' is the equivalent of 'republican', and implies that monarchy is excluded.<sup>3</sup> The terms 'representative' and 'representative body' (*Volksvertretung*), imply the notion and institution of the Parliamentary system, and exclude any sort of a dictatorial system, whether of one or a minority.<sup>4</sup>

Then a government with the essential feature of the Cabinet system, responsibility to the Parliament is provided,<sup>5</sup> but a variety of forms, including the Government's power to meet a vote of no confi-

<sup>1</sup> *Denkschrift* (20 Jan. 1919). *Entwurf*.

<sup>2</sup> Kahl, *Heilfron*, p. 1255.

<sup>3</sup> Anschütz, *op. cit.*, Art. 17; Poetzsch, *op. cit.*, *ibid.*

<sup>4</sup> Cf. Anschütz, p. 85; Preusz, *Reich und Länder*, p. 147; Haas, *Heilfron*, p. 1258.

<sup>5</sup> Cf. Preusz, *Bericht und Protokoll*, p. 111.

dence with a referendum, is permissible. Is a bicameral system permitted? Preusz's original draft actually prescribed a unicameral parliament, but it was thereafter deleted, and in the Constitutional Committee it was admitted that a Second Chamber was possible<sup>1</sup>; and commentators now argue that if this is so, it is only possible in the form that the Representative Body, spoken of in Article 17, is one, while at its side another organ exists, which is not Parliament, but only a check upon Parliament.<sup>2</sup> Thus in Prussia there is a State Council<sup>3</sup> 'representing the provinces in state legislation and administration', but its members do not enjoy the immunities given by the Constitution to members of parliament.

As we shall see, vehement objections to this article are expressed in Bavaria.

**Territorial Reorganization.** The struggle between the unitarists' desire for power freely to redistribute the areas of the states for Federal utility, and to secure, at least, that no state should have a population smaller than two million, and the separatists' ardent desire to be left alone to make friendly arrangements should it suit them, resulted in a limited victory for the unitarists. Article 18 received this final shape:

'The composition of the Reich by states shall serve the maximum economic and cultural utility of the nation, with the fullest consideration for the will of the population concerned. Alteration of the territory of the states and the formation of states within the Reich shall be effected by a law for the amendment of the constitution. If the directly concerned states assent, then an ordinary Reich statute suffices.

'An ordinary Reich statute also suffices if one of the states concerned does not assent, but where the alteration of territory or reorganization is demanded by the will of the population and required by paramount Reich interests, the will of the population shall be ascertained by a poll. The Reich Government orders the poll, if required by a third of the enfranchised inhabitants of the territory to be separated.'<sup>4</sup>

These things are to be emphasized: that alterations of territory

<sup>1</sup> Cf. debate, *ibid.*, p. 110 ff.

<sup>2</sup> Anschütz, *loc. cit.*

<sup>3</sup> Constitution, 1920, Arts. 31 ff.

<sup>4</sup> The article continues: 'For the determination of an alteration or reorganization of territory, the proportion of votes required is three-fifths of the number cast, or, at the least, a majority of the votes of persons qualified. Even when it is a question of the separation of only a portion of a Prussian administrative area (Regierungsbezirk), a Bavarian district (Kreis), or of a corresponding administrative district (Verwaltungsbezirk) in other states, the will of the population of the whole district in question shall be ascertained. Should the area of the territory to be separated and that of the whole district (Bezirk) not coincide, the will of the population of the former may, by means of a special Federal law, be declared sufficient.

'The consent of the population having been obtained, the Federal Government shall lay before the Reichstag a law in accordance with the decision.

'In the case of union or separation, should any dispute arise on the question of arrangements as to property, the decision on such points shall be given, upon an application from one party, by the Court of State of the German Federation.'

may now occur, and only by Federal law, and this distinguishes the present constitution from that of 1871, which concerned itself only with the alteration of foreign frontiers; that a constitutional amendment can overcome any state or states; the procedure is more complicated, and safeguards minorities, where any one state to the arrangement refuses assent, and then the state government is, under conditions, overrutable by the people of the area immediately concerned.

So far, the clause: 'When the states directly concerned give their consent, an ordinary Federal law suffices', has been used only in the union of Prussia and Pymont.<sup>1</sup> Only two changes of territory, the formation of Thuringia out of seven small states,<sup>2</sup> and the union of Coburg with Bavaria,<sup>3</sup> took place by constitutional amendment, since the assent of the states could not be formally ascertained. In 1928, Saxony and Thuringia exchanged enclaves, and Waldeck merged in Prussia.

Other attempts at reorganization failed: that to constitute a separate state of Upper Silesia, in November, 1922, by a ten-to-one majority of the population in favour of remaining with Prussia, while in Hanover a good deal less than one-third of the voters voted in favour of a plebiscite to separate from Prussia.

However, the article is as important for its continuous challenge to inquiry and re-arrangement as for its immediate effects. While it exists there can be no rest. It produced a law relating to its execution in cases where the Reich takes the initiative,<sup>4</sup> and a Reich Bureau, which was dissolved in 1929.<sup>5</sup> The Law has not been used since the states exacted a promise that the Reich would not act without their assent.

The work of territorial reorganization has now fallen into the sphere of the general constitutional reorganization desired on many sides, and began with the calling of the State Conference in 1928.

**Reichs-exekution.** Under the Weimar Constitution the Reich President, that is, the Government, has the power to compel a State to fulfil its constitutional obligations, thus (Art. 48): 'If a State does not carry out its obligations under the Reich Constitution or Statutes, the President can compel it to do so with the aid of armed force.' Thus the power has been taken from an organ, the Bundestat, which was not likely by its composition to force a State, to one which is less unlikely to do so, unless the President happened to be a native of the State which was to be forced. The decision of the President can be challenged by an appeal to Court of State or other Courts,

<sup>1</sup> Law, 24 March 1922.

<sup>2</sup> Law, 30 April 1920.

<sup>3</sup> Law, 30 April 1920.

<sup>4</sup> 8 July 1922 (RGBl., I, 545). See the interesting description of its passage, and the political forces involved therein; Schoppmeier, *op. cit.*, 60 ff.

<sup>5</sup> Its dissolution was undertaken on the ground that the Committee set up at the end of 1928 by the *Conference of States*, of which we speak presently, sufficed for the work.

where the Constitution permits an appeal in cases of disputes about interpretation, but authorities differ whether this is an obstruction to immediate intervention by the President.<sup>1</sup>

**Survey.** The German Reich is a federation in which the unitary element is very strongly marked. The Constitution of 1919 conquered a good deal of the still existing particularism of the states, but its attempts were met by a well-organized resistance. The result is that the anti-unitary elements are still strongly stressed, much more so than in the U.S.A.; *for the Reich has not been able to obtain the plenitude of administrative powers.* It is true, again, that it has a wider sphere of legislative power than the U.S.A.; but in such things as territorial reorganization, in which its unitary bias received pronounced expression, it has not been able to make much way. The Reichsrat, which was not meant to be an independent body, has gradually become powerful.

What has happened? The unitary and the separatist forces were intertwined, balanced and closely knit by the constitution, but neither consider the settlement permanent—the forces live, and have gained strength in the exercise of the Federal machinery. Moreover, the needs of the time are exceedingly disturbing. Hence, criticisms of the constitution have accumulated on either side—towards a unitary state, and towards a looser federation. Let us indicate the tendencies and their causes.

The Unitarists wish to see the many concessions to the states modified or entirely abolished, especially in regard to territorial reorganization, the administration of Reich affairs, the power of the Reichsrat, the power of the states to make treaties with foreign countries,<sup>2</sup> and their claims regarding army organization.<sup>3</sup> It is argued that the partial duplication of parliamentary and administrative machinery in so many states—eighteen—some with ridiculously small populations is financially wasteful,<sup>4</sup> and, even worse, that the whole arrangement in states of this size makes systematical administrative reform with its consequent efficiency and financial economy impossible. Especially wasteful is the co-existence of two great organizations, Prussia and Reich in Berlin, and over the whole of Prussia. Varying regulations break up and make impossible the easy transfer of citizens from state to state in the great professions of civil service and law, while ludicrous situations are caused by the intersection of great urban complexes like Hamburg-Altona, Bremen-Wesermunde, Frankfurt-

<sup>1</sup> Cf. Triepel, *against*, op. cit., p. 61 ff., and Anschütz, op. cit., p. 169 (for); and on the whole subject, cf. Anschütz, in *Handbuch des deutschen Staatsrechts*, I, 377–80.

<sup>2</sup> Art. 78, Sect. 2.

<sup>3</sup> Art. 79.

<sup>4</sup> Cf. footnote to page 371 *supra*; Braun, *Die Deutsche Einheitsstaat* (1927); Apelt, *Vom Bundesstaat zum Regionalstaat* (1927); Brecht, *Reich und Länder* (Heft, Gesellschaft).



am-Main-Offenbach by state boundaries. The Regional aspect of rearrangements of area is very strongly stressed.

Hence the plans of reform go all the way from amendment of the present Federation in small particulars, to the abolition of the states, as such, and their replacement by great Regions founded upon geographic and economic bases, with extensive rights of local self-government. Short of this, the reformers wish to see the creation of a Reich Civil Service covering the entire field of its legislative competence; the establishment of a Supreme Administrative Court with full jurisdiction to act as a court of appeal from the administrative authorities wherever they are; the abolition of state rights, however small, regarding the military forces; the creation, by a Reich local government charter, of Reich cities, withdrawn from the jurisdiction of the states and subject only to the Reich; the financial absolutism of the Federation. As for the Reichsrat its various powers of challenge should be abolished; and some urge its replacement by a House of States composed by popular vote like the Senate of the U.S.A.

Who maintains these various unitarist views? As usual in politics, a concourse of groups who are on other matters in opposition. The Social Democrats and the Communists because of their unified onslaught upon the rulers of the old state and the desire for uniform rules of social welfare and administration throughout the Reich, the Democrats largely out of traditional connexion with the original unity movement founded upon the extension of universal civic rights of freedom, the Centre Party (with the exception of the Bavarian wing) because it needs to gather all its Catholic votes over the whole of the territory to make them powerful parliamentarily, which is so easily achieved in a parliament full of groups. Moreover, these parties made the constitution, and it will be many years before they are prepared to admit its difficulties as pronounced by the anti-unitarists. The Reichstag is generally unitarist from motives defensive of its own power, and as the bearer of a tradition of unity. The Reich Civil Servants are strongly, and very efficiently, centralists: for centralization is soundly based in administrative technique from a scientific standpoint, while the motives to increase of power and the abolition of vexation and delays involved in dealing with many authorities ('making allowances' for them) are naturally spontaneous. So also the Reich Ministers. Finally, the great functional associations find their plans easy to make and to realize where they have a complete field unencumbered with a multitude of varying regulations and authorities which must be propitiated.

On the other hand, anti-unitarist criticism is as comprehensive and perhaps as strong in political power. It has come mainly, though not entirely, from Bavaria, too large to subject others, too small to accept subjection. It is argued that the constitution permanently

endows the central authority with a power won at an exceptional time, and appropriate for emergencies only, and that this has converted the 'joy in the Reich' (*Reichsfreudigkeit*) into 'grievance in the Reich' (*Reichsverdrossenheit*). The financial powers of the Reich have taken away all resiliency and strength from the states, the Reich officials only duplicate their already existing organizations, the various powers over the states have wounded their patriotism, while centralization goes far to reduce their power to pursue their own peculiar cultural development. Nor is that all: there are the special claims of Bavaria arising from her size and urgent sense of historical uniqueness—and of Prussia arising from her extraordinary size, services and general significance.

The Bavarian claims are set out in the Programmes of 1920 and 1922 of the Bavarian People's Party, and the Bavarian Government Memoranda of 1923 and 1926. Their essence is the same, and it is this<sup>1</sup>

'All are agreed, without distinction of movements and parties, in the recognition that the unique quality of the German states is the source of all the great things created in Germany during the centuries. Therefore, the whole of the German people is at one in the demand that the uniqueness of the German states and races shall be unconditionally protected. There is also no difference of opinion that this uniqueness can only be maintained if there remains to the states a sphere of life of their own. The further consequence, although it is unavoidable, people will not recognize: That independent life is only possible if independent statehood is established upon a firm constitutional basis. Those who are really concerned with the maintenance of the uniqueness of the German races, must logically admit the principle of their independent statehood. The framework of self-government on the basis of a "sound decentralization" is not adequate to this, because this very decentralization includes, conceptually, the decision of all vital questions by the central authority.'

Out of this doctrine are derived these claims for the States: to make treaties with foreign powers on economic and cultural matters, to appoint representatives abroad and receive foreign ambassadors; far-reaching participation in the appointment of high officials and officers in the army: a primary right to deal with a state of emergency, and only a subsidiary right in the Reich<sup>2</sup>; the abolition of the powers of the Reich in normative legislation, since this leads to legal conflict and goes beyond mere principles; abolition of the clause permitting Reich administration upon passage of a Federal law; state participation in the administration of communications, and power of the States to employ their own corps of officials without the incursion of non-nationals, and the exclusive disciplinary power therein. Of course, also, the whole financial system is challenged. The Reichsrat ought to have a com-

<sup>1</sup> *Denkschrift* (1923).

<sup>2</sup> Cf. discussion of this in Chapter on *Chiefs of State*, section relating to the President of Germany.

plete equality in legislation and finance with the Reichstag ; in constitutional matters a veto, similar to Prussia's under the old constitution, ought to be reconstituted ; the Reichsrat ought to have full power with the Reichstag in the ratification of treaties ; administrative orders should be entirely made by the Reichsrat, not merely submitted for its acceptance ; the government should be responsible to the Reichsrat. The whole of Article 17 is attacked as fastening upon the States constitutions and electoral systems which do not suit them—Bavaria, above all, desires the return of monarchy. As to the reorganization of the territories the anti-unitarists think this should be left entirely to the States.

Who are the anti-unitarists ? Principally the Bavarian People's Party, which is founded upon a Catholic population of Bavaria equal to two-thirds of the total number of inhabitants. These are invigorated by leaders of separatism under the old constitution, and aided by the Bavarian Peasants' Party. There is a German Hanoverian Party anxious to sever Hanover from Prussia. The German National Party wishes to return to the Prussian ' hegemonial ' federation of 1871–1918. The other natural opponents of unitarism are the State Parliaments, Governments and Civil Services.

The separatist force dies hard in Bavaria, for it has certain material ingredients which can neither be swept away nor denied. There is an acknowledged difference in temperament between the South and the North ; the South is still more agricultural, more a land of small trades and industries than the North ; the peasantry and the lower middle classes form the largest proportion of the population. Hence differences of political outlook and institutions, and a lack of understanding for the great masses of headlong-driving workers, commercial people and industrialists of the North. The great mass of the Catholics can control their own country if it is independent ; not so if the Reich assumes more power, for the Catholics are in a minority in the Reich. The war roused jealousy of Prussia and the Reich, and the immediate aftermath of the Socialist revolution in a Catholic and peasant country inflamed dislike of the Reich which is still largely governed by the Socialist Party. Hence the relationship between Bavaria and the Reich has not been a pretty one. She was restive under the emergency measures taken in 1921 upon the assassination of Erzberger, and out of the measures taken to protect the Republic<sup>1</sup> in 1922 after the murder of Rathenau, a great and serious conflict arose between the Reich and Bavaria, especially regarding the activities of the special force of the Reich Criminal Police,<sup>2</sup> and the disciplinary power claimed over all officials, in 1923, at the conclusion of passive resistance

<sup>1</sup> Cf. *Der Schutz der deutschen Republik* (an explanation of the Laws for the Protection of the Republic), by Endmannsdörffer (1922).

<sup>2</sup> Poetzsch, *Jahrbuch*, 1925.

in the Ruhr. Bavaria constantly claims a right to independent expression in foreign affairs, and continuously challenges the Reich's financial arrangements.

The remedies suggested are three : a position equivalent to that of 1871, with reserved rights,<sup>1</sup> and this would cause similar claims by other States ; changes in the constitution benefiting all, especially the establishment of a veto power in the Reichsrat on certain legislation and constitutional amendments ; thirdly, the division of Prussia—an impossibility. Indeed, the German problem has almost reached the condition of being only a Bavarian-Prussian problem—and thus an insoluble one.

**Prussia and the Reich.** Bavaria may have her claims : but Prussia certainly has the right to claim more. She has a population of 38 million in a federation of 62 million ; her wealth and activity are even greater in proportion to the rest. Yet her representation in the Reichsrat is in total not above two-fifths of the entire representation, and her votes are not cast as a unit, and are sometimes neutralized by mutual cancellation. Hence a humiliating mendicancy at the Reich Departments, which naturally allow for Prussia's wishes before ever the projects and orders are put before the Reichsrat. In this large territory the duplication and wastefulness of Prussian and Reich administration are especially observable,<sup>2</sup> as also the difficulty of Federal success without Prussian support. Its position as unifier of Germany has been broken by the reduction of its votes and veto power in the Reichsrat, and the disruption of the former personal association of Chancellor and Prussian Cabinet.

Its relations with the Reich have been difficult, and this mainly because the party composition of the Governments of Prussia and the Reich have, naturally, not always squared, although the size of Prussia and the variety of its territories reduced the possibility of that utter apportion which was apparent so often in Bavaria and many other States. The possibility always existed and exists, and hence Prussia has been fruitful with suggestions for the coming of a full unitary State. These have not yet succeeded, and the history of the last ten years has been marked by many serious differences in administrative policy, in which the pride of both sides was wounded, on one occasion so badly, that the Prussian Prime Minister threatened to break off relations with the Reich Minister of the interior. Beyond that ? Reichs exekution and conflict—and then certainly a revision of the constitution.

What are the suggestions for the solution of the Prussian's position

<sup>1</sup> Kahl, *Deutsche Juristenzeitung*, Dec., 1923.

<sup>2</sup> Höpker-Aschoff, *Deutscher Einheitsstaat* (1928), p. 4 ff.

in the Reich ?<sup>1</sup> They are a completely unitary State ; or the division of Prussia ; or the re-establishment of Prussian hegemony ; or the conversion of Prussia into an immediate province of the Reich—a *Reichsland* as the phrase goes. The first solution may come, but only after many years of quiet and successful development of the Reich's power and utility—after many years only, since Particularism, especially in Bavaria, is so strong. The second, whether as complete disruption, or as a strengthening of the power of the Prussian Provinces, is impossible owing to the strong sentiment of Prussians for the unity of their land and the utility to the Reich of its large coherence. The fourth solution has a great deal of common sense to recommend it, but Bavaria and other States would never permit it, for it must, first, lead to added Prussian influence over the whole of Germany, even if Prussia was declared to be merged in Germany, and in the end a unitary State would come about by discussion or veiled coercion ; and, further, in a general election for the Reichstag it might easily happen that non-Prussian nobles would determine the majority, as in the Presidential election of 1925, when Marx, Hindenburg's chief opponent, obtained a majority in Prussia, but not in other States—a situation not contemplated with pleasure by Prussians as an exchange for their dissolution in the Reich. The third solution was especially combated at the National Assembly in 1919, and formally, of course, it stands little chance of realization now. Yet informally, through Prussian influence in the Reichstag, the Reich Government, and the Reich Departments it wins its way ; but crippled, and always to be crippled, while the present *peaceful* tension of forces operates in the Reich. If ever the Reich and Prussia come into conflict, the formal hegemony of Prussia will be re-introduced, though not with the power of the Constitution of 1871.

**The Länder Konferenz.** These various considerations of inaugural difficulties inevitably drove the States to a conference in 1928, the demand for the exploration of conditions of a Unitary State being dominant. State ministers met in Berlin from the 16th to the 18th January, to exchange views on the relationship between the Reich and the States, measures to secure economical public finance and practical administrative reform in Reich and States. The Reich Government put forward no proposals, the State representatives had no power to make engagements, and they, unfortunately, expressed views as speaking for their States. They pressed the considerations we have already indicated,<sup>2</sup> and only after the most despairing pleas in the lobbies by the Government could a neutral set of resolutions be passed.

<sup>1</sup> Höpker-Aschoff, op. cit. ; Schmidt, *Reich und Preussen*, in *Zeitschrift für Politik*, XVI, 3 ; Kitz, *Reichsland Preussen* (1926) ; Koch-Weser, *Einheitsstaat und Selbstverwaltung* (1928).

<sup>2</sup> Cf. *Länderkonferenz* (Report, [Stilke, Berlin, 1928]).

There is no mention of Prussia and the Reich, and the problems indicated are only of the secondary importance. A fundamental reform is declared necessary ; there must be a strong Reich authority (but there is no agreement on how to obtain it). Small States should not become directly administered by the Reich, but put on their feet by financial reorganization (but not grant-in-aid from the Reich). When small States *desire* amalgamation with others, the Reich should facilitate this. More inter-State agreements for legal and administrative uniformity and simplification should be made. Administrative reform in Reich States and local authorities was urgent to save waste, and should be undertaken only after report by the Federal Economy Commissioner (*Reichsparkommissar*). A Constitutional Committee was established to prepare a solution of the problems. This Committee is composed of equal numbers appointed by the Reich Government and the Governments represented in the Constitutional Committee of the Reichsrat, who choose one each. Co-option is permitted ; and experts may be appointed. The Reich Chancellor presides. The Committee is at work.



## PART IV

### THE SOVEREIGN MAJORITY

CHAPTER XI. THE ELECTORATE AND POLITICAL PARTIES

CHAPTER XII. REPRESENTATIVE GOVERNMENT IS PARTY GOVERNMENT

CHAPTER XIII. PUBLIC OPINION AND THE PARTIES

CHAPTER XIV. A CLOSER VIEW OF PARTY

CHAPTER XV. THE CREEDS AND POLICIES OF MODERN PARTIES

‘Decision by majorities is as much an expedient as lighting by gas. In adopting it as a rule, we are not realizing perfection, but bowing to an imperfection. It has the great merit of avoiding, and that by a test perfectly definite, the last resort to violence; and of making force itself the servant instead of the master of authority. But our country rejoices in the belief that she does not decide all things by majorities.’—GLADSTONE.

‘Governments therefore should not be the only active powers: associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away. . . . In democratic countries the science of association is the mother of science: the progress of all the rest depends upon the progress it has made. Amongst the laws which rule human societies there is one which seems to be more precise and clear than all the others. If men are to remain civilized, or to become so, the art of associating together must grow and improve, in the same ratio in which the equality of conditions is increased.’—DE TOCQUEVILLE.





## CHAPTER XI

### THE ELECTORATE AND POLITICAL PARTIES

**A**NALYSIS of the idea of democracy has indicated that it may mean either of two things, which, however, are closely related in practice : a certain social purpose, or a specific machinery of government. Here we are concerned with the latter, and in this respect, generally speaking, democratic theorists have sought something labelled alternatively Responsible Government or Representative Government. These are not exactly coincident, but are very nearly so, responsibility being the chief and wider aim, and representativeness being merely a convenient means to attain this. It should be remembered that there has been government in which a representative assembly participated, so hampered, however, that it could not be called Responsible. The chief modern example of this was the government of Germany before 1919. On the other hand, government may be responsible and yet not representative, because the people to whom it is responsible may act *directly* by popular vote. Of this there are no more examples in modern times, if we except the extraordinary procedure for ratifying constitutions (and this is to strain the example too much). *The desire for responsible government is paramount; people wish not merely to represent their views, but actually to make and unmake governments.*<sup>1</sup>

To whom, then, ought government to be responsible? Who ought to control the making of laws and their administration? Openly or silently men decide this by their general social philosophy. They ask, 'What should I like to see government accomplish?' The answer generally dictates the desirable form of government, and this again settles for them the extent to which others should be represented. James Mill, for instance, desired the utmost perfection of society, and this was expressed for him in the principle of the greatest happiness of the greatest number. Thence it was simple to proceed to democratic government, and further, to representative government with universal suffrage.<sup>2</sup> But Macaulay was anxious for property,

<sup>1</sup> This was what so roused Burke's anger (in his *Reflections*) against Dr. Price and his friends.

<sup>2</sup> *Essay on Government*.

and to safeguard it he held that any franchise—that is, any system of representative government—which included the unpropertied working classes was ruinous.<sup>1</sup>

That question answered, there still remains another. How may the power to govern be best applied? One technique may give good results—that is, produce what is intended, and even give incidental benefits, another may not produce what is intended, or may do so with a waste of energy and resources, and even have results which were meant to be avoided. Once it has been decided to have responsible Government, the problem becomes whether the people shall act directly or through representatives. Now no modern State has faced this *ab initio*; every State, except the smallest, Switzerland, has found itself compelled to govern through the medium of a representative body. The reasons could be deduced from the nature of the work to be done by government. But we are fortunate in having the reasons put by a body of people—the French Constituent Assembly of 1789—who actually faced a situation spiritually favourable to direct government, and it is instructive to ask why representative was preferred to direct government. The reasons adduced were: the impossibility of proper deliberation over a large area and with a large number of people to consult; that it was unnecessary to take the opinion of *all* citizens, sufficient direction being obtainable from a selection of them; that not all people had either the leisure or instruction to judge capably of legislation; that tumultuous proceedings and demagoguery must prevail where no systematic procedure existed; and that, to secure the benefit of division of labour, it was good that citizens should allow representatives to exercise the function of government.<sup>2</sup> We may hazard a further reason: the deputies, as the debates plainly showed, enjoyed being deputies, and were anxious to remain deputies; they relished their powers, and acquired a professional interest in maintaining that representative government was more feasible than direct.<sup>3</sup>

Their arguments—valid, we think—have prevailed; with the result that everywhere democratic government means, practically, a representative assembly in the centre of the machinery of government. Nevertheless, Representative Government has not absolutely triumphed, for some countries seek to remedy its shortcomings by the addition of the Referendum and the Initiative.<sup>4</sup>

<sup>1</sup> E.g. Speech on the Chartists' Petition. Bagehot was ready to have the working classes represented, in the sense of permitting their spokesmen to appear, but would not allow them the full voting *force* of their total numbers. Cf. *Essays on Parliamentary Reform* (written 1859).

<sup>2</sup> All this is shown with a great abundance of learning in Loewenstein, *Volk und Parlament (nach der Staatslehre der Französischen Nationalversammlung von 1789)*, München, 1922.

<sup>3</sup> *Ibid.*, citations from speeches, *passim*.

<sup>4</sup> Cf. Chap. XIX, *infra*.

In the main, however, modern government is through popularly elected Parliaments and *Ministers responsible thereto*. This qualification must, however, always be remembered : that owing to the existence and activity of special organizations to influence the electors in their choice of representatives—Political Parties—even representative government without any formal admixture of Direct Government has been made substantially Direct. Representatives are selected, catechized, pledged, supported and afterwards controlled in their parliamentary activities by parties in close and continuous touch with the electorate, so that absolute differences between Direct and Indirect Democracy do not exist : and the question, which is the better instrument of government, turns upon the comparative merits of the Party Organization of a State and any alternative organization which might be improvised for direct popular government. To this question we return, therefore, only when we have completely reviewed the subject of Parties and Parliaments.

\* \* \* \* \*

The chief democratic theorists do not apparently diverge a great deal in their definitions of Representative Government. The most concise form in which Locke expressed himself on this subject is in this passage :

‘ It is in their legislative that the members of a commonwealth are united and combined together into one coherent living body. This is the soul that gives form, life and unity to the commonwealth ; from hence the several members have their mutual influence, sympathy and connexion ; and therefore when the legislative is broken, or dissolved, dissolution and death follows. For the essence and union of the society consisting in having one will, the legislative, when once established by the majority, has the declaring and, as it were, keeping of that will. The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union under the direction of persons and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them can have authority of making law that shall be binding to the rest.’<sup>1</sup>

Such descriptions of representative government are very general, and reveal few or none of the difficulties inherent in its nature, nor, consequently, the wide gulf which actually separates people when the

<sup>1</sup> Second Treatise, Chap. XIX, p. 212. Cf. also Priestly, *Lectures on History*, No. XLI, Edition of 1826 : ‘ In a state of political liberty, the people must have a control over the government, by themselves or their representatives. In large states this can only be done in the latter method ; . . . where great numbers of persons are concerned, it is of infinite advantage that they do not deliberate and decide *themselves*, but choose a few to act for them. These having a *trust*, and knowing that the eyes of the whole community are upon them, will be desirous of discharging their trust with reputation to themselves, and consequently with advantage to their constituents.’ Cf. also J. S. Mill, *Representative Government*, Chap. 5 : ‘ The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which it, in every constitution, must possess in all its completeness.’

term 'representative' is to be put into practice. Reflection, however, shows that these vital problems are involved : (1) what entities shall the government represent ? (2) who may choose representatives ? (3) how shall candidates for the assembly be chosen ? (4) how far is it permissible to influence others in the election of candidates ? (5) to what degree is the representative obliged to obey the directions of the electors ? If we answer these questions by reference to the theories held at different times, and the practices based thereon, we shall discover more exactly what Representative Government means. Let it be remembered that it is not merely representation which is sought, and accorded by democratic theory, but the actual selection and dismissal of the executive.

What entities shall the government represent ? At the present time, and in all the countries of which we speak, parliamentary assemblies are said to represent the 'nation', the 'country' or 'the people', or the 'electorate', and these terms generally mean the whole body of citizens, considered as equally entitled to representation, and free of connexion with each other except through their common residence in an area ordained by the law to be an electoral district. Representation is Territorial, a vague image of the whole of the State's territory being conceived, this falling into districts convenient for registration and polling purposes. It is largely convenience<sup>1</sup> which determines the size and nature of the electoral district, and not the local existence of a definite Interest whose representation is considered to be desirable. It sometimes happens, in England especially, that an electoral district coincides with some ancient borough or rural area because for centuries it was a parliamentary unit, and it has come to be thought of, sentimentally, as having a corporate existence.

Within this territorial scheme the electors are supposed to be free and equal atoms. Continental writers have for over a century applied to this system the term 'atomized' and 'pulverized', meaning that the whole nation is split into sovereign fragments, all entitled to equal power in fashioning policy. This doctrine is not much older, politically, than the French Revolution, though it goes back, philosophically, to the rise of modern religious Nonconformity and the Reformation. It replaced the old system of 'community' representation, and 'virtual representation', on the Continent and in England. According to the first<sup>2</sup> representatives were summoned, not because government was

<sup>1</sup> It depends, in fact, upon the reasonable size of Parliament, the struggle of parties for special advantage in their own strong districts, and partly upon the desire to represent already existing entities like counties, cities, townships.

<sup>2</sup> In England members of many 'grades' or 'estates' of society were, in the fourteenth century, called by the Crown to its deliberations, and the bishops, earls, barons and knights, citizens and burgesses, were not, strictly speaking, 'representative' of anybody else in the sense of a delegated power held upon pledges by the mem-

based upon the sovereign authority of the People, but because the tenure of land was the foundation of order and political obligation, its products were the chief sources of taxation, and in troubled times it was easier for kings to collect taxes if they appeared, at least, to consult the taxpayers. Hence the growth of the idea that communities, bodies of people, constituent and substantial parts of Society, were the proper units upon which to plan a parliamentary assembly.

The second (composed by the landed aristocracy who enjoyed political power) is most concisely expressed in Paley's words :

'Before we seek to obtain anything more, consider duly what we already have. We have a House of Commons composed of 548 members, in which number are found the most considerable landholders and merchants of the Kingdom ; the heads of the army, the navy and the law ; the occupiers of great offices in the state ; together with many private individuals eminent by their knowledge, eloquence and activity. If the country be not safe in such hands, in whom may it confide its interest ? If such a number of such men be liable to the influence of corrupt motives, what assembly of men will be secure from the same danger ? Does any new scheme of representation promise to collect together more wisdom, or to produce firmer integrity ? ' <sup>1</sup>

bers or by instructions from the estates (cf. Pollard, *Evolution of Parliament* Chap. IV). There was neither a notion of popular election nor of government by any authority except the Crown. The grades which together correspond to the present House of Commons were representative of 'communes', that is, the organized bodies from which they came ; not of a mere aggregation of persons as now. 'The Commons are the communities or *universitates*, the organized bodies of freemen of the shires and towns, and the estate of the commons is the *communitas communitatum*, the general body into which for the purposes of parliament these communities are combined' (cf. Stubbs, *Constitutional History*, II, 185).

A variety of franchises grew up in different counties and boroughs, but for centuries this was not considered to be a political wrong, though sometimes accounted a blemish (cf. Locke, *Civil Government*), nor was uniformity of franchise deemed essential. It was enough that Parliament was composed so that, broadly, the socially important elements could be deemed to be there present. Sir Thomas Smith's famous description (*De Republica Anglorum*, Alstree Edn., pp. 48, 49) says no more and no less than this : Every Englishman might be 'intended' to be present in Parliament but he was not, nor were rational arrangements made to satisfy him that he was ; nor was there adequate security that those who actually were in Parliament could be made to act as though they believed every Englishman were present and claiming due attention.

Other radical democratic thinkers like John Lilburne in the seventeenth century demanded, as we have seen, a levelling of all men as the basis for representation in Parliament. An address to Parliament in 1645 speaks of 'freeborn people to their own House of Commons' (Gooch, *English Democratic Ideas in the Seventeenth Century*, p. 123), and calls upon 'their commissioners in Parliament to account how they in this session have discharged their duties to the universality of the people, their sovereign Lord, from whom their power and strength is derived, and by whose favour it is continued'. *The Agreement of the People* put these ideas into practical form, declaring 'that the people of England be indifferently proportioned' according to population, that Parliaments should be elected every two years, that all and only persons ordinarily rated to poor rate (but not servants) should have the right to vote, and prescribing fines for persons who hindered electors 'in their quiet and free election of representatives'. The Agreement speaks in very modern terms : the legislature itself is called The Representative.

<sup>1</sup> W. Paley, *Works* (London, 1825), IV ; *The Principles of Moral and Political Philosophy*, Bk. VI, pp. 392, 393.

The doctrine embodies two ideas—that of social bodies to be represented, but also the independence of the representative from the people to be represented. There were reformers, but as Macaulay said, speaking of the early part of this era,<sup>1</sup> the object of the reformers was merely to make the representative body a more faithful interpreter of the sense of the constituent—it occurred to none that the constituent body might be an unfaithful interpreter of the sense of the nation.

Even Burke was only *temporarily* excited by the Wilkes' case, and he accepted virtual representation :

'The virtue, spirit and essence of a House of Commons consists in its being the express image of the feelings of the nation. It was not instituted to be a control upon the people, as of late it has been taught, by a doctrine of the most pernicious tendency. It was designed as a control for the people. . . . This change from an immediate state of procurator and delegation to a course of acting as from original power, is the way in which all popular magistracies in the world have been perverted from their purposes.'<sup>2</sup>

He soon however returned to the idea of 'virtual representation'.

The 'stake in the country' or 'interest' theory of representation<sup>3</sup> could not be surrendered by those who held it—for it was a product of their practical monopoly and part of the defence of that monopoly. Its natural fruits were the hideous maldistribution of seats, the queer franchises, and the electoral corruption which persisted until 1832 despite all debate about reform.<sup>4</sup> Nor could theory and practice be

<sup>1</sup> *History of England*, Chap. XIX (1692).

<sup>2</sup> *Present Discontents* (World's Classics Ed.), II, 51, 52. Burke talks of 'popular election', and says that 'without it, or something equivalent to it' (*sic*), the people cannot enjoy the substance of freedom. He then proceeds quite happily to say: 'The frame of our commonwealth did not admit of such an actual election: *but it provided as well*, and (while the spirit of the constitution is preserved) better for all the effects of it than by the method of suffrage in any democratic state whatsoever. It had always, until of late, been held the first duty of Parliament to refuse to support Government *until power was in the hands of persons who were acceptable to the people*. . . . Thus all the good effects of popular election were supposed to be secured to us, without the mischiefs attending on perpetual intrigue, and a distinct canvass for every particular office throughout the body of the people. This was the most noble and refined part of our constitution. The people, by their representatives and grantees, were intrusted with a deliberative power in making laws. . . .' (*ibid.*, p. 35). Observe then: 'acceptable to', or 'something equivalent to', 'representatives and grantees', and he talks further of 'sway among any part of the landed or commercial interest' as a title to 'connexion with the interest of the people', and 'the Commons shall bear *some* stamp of the actual disposition of the people at large' (*ibid.*, p. 50). But one half of the Whig Party and more were separated by gulf from even the moderate portions of this gospel. When men offer the alternative of an 'equivalent', let the buyer beware! for the vendor is usually substituting an inferior article.

<sup>3</sup> Chatham (1776): 'People, however, are apt to mistake the nature of Representation which is not of person but of property; and in this light there is scarcely a blade of oats which is not represented.' Veitch, *The Genesis of Parliamentary Reform*, p. 37, and Lecky, *Democracy and Liberty*, I, 1 et seq., gives a fairly long description of the eighteenth-century conception of representation; but it is not documented.

<sup>4</sup> Cf. Namier, *Structure of Politics*, e.g. I, 93: 'Taking England as a whole, probably not more than one in every twenty voters at county elections could freely exercise his statutory rights, and the country members, though a valuable element in the

changed until a hostile doctrine, claiming universal validity, violently challenged it. The attack was made in the name of the Natural Rights of Man, and in the vanguard were the middle classes, the working classes acting as important allies in the two decades after the end of the Napoleonic Wars. The old tenets died a hard death, and to the last, in 1832, and even beyond, they were defended as wholesome for the Commonwealth.<sup>1</sup> Nor did France know the representation of individual persons until the Revolution.<sup>2</sup> The system of three estates was possible only as long as a graded social importance was not actively challenged; and that was possible only while the monarchy was absolute.<sup>3</sup> When the monarchy fell, the question naturally arose, who was to inherit the authority to govern. The answer that nobility and clergy should be two to one against the Third Estate was ridiculous; for, in that position, the Third Estate was indeed nothing. This was soon observed in 1788 and 1789, when the Revolution was brewing, and the holders of power held to their privileges until violence took them away.<sup>4</sup>

House in that most of them were independent of the Government, constituted the purest element of class representation in Great Britain, to a high degree, of an hereditary character.' Cf. Porritt, *Unreformed House of Commons*.

<sup>1</sup> Butler, *Passing of the Great Reform Bill*, Chap. V.

<sup>2</sup> The ineffective and infrequent *États Généraux* consisted of three Estates, deliberating and voting separately,—Nobles, Clergy and Third Estate, the last-named corresponding roughly to the English Commons. There was no settled manner of composition or convention of the Estates, nor had they a regular procedure. It sufficed for royal purposes to approach the great lords, the Church, the municipal authorities and to get them to come in person or by procuration. Gradually the smaller lords came by their representatives, and the system of election was extended also to the other Orders,—it cost the Crown nothing, and was desired by the proud Orders. Sometimes the Crown attempted to depress the Church by ordering common election of all representatives, but this, which pleased the people and the nobility, was rejected by the Church which feared 'the enterprises of the laity against the authority of the Church and the liberty of the clergy' (Viолет, *Histoire des Institutions Politiques et administratives de la France*, III, 193). Yet sometimes such common election actually took place; in Languedoc it was the usual procedure (Picot, *Les Élections aux États Généraux dans les provinces*, pp. 36, 37). The Orders were separate, but as a rule deliberated in common by dividing up into a number of committees, each corresponding to a territorial region. In some assemblies, as that of 1484, there was even vote by head, so that the Orders were combined. But this could only occur when the Orders were unanimous, which happened most usually on the question of the weight of taxation; as soon as one Order could not see eye to eye with one other, they separated and became distinct, sometimes hostile bodies. However, since taxation and common resistance to royal power were normally the vital political questions, the barriers between the Orders were not up, save between assemblies, or when serious dissension developed.

<sup>3</sup> A convenient study of the history of the electoral unit is Aulneau, *La circonscription électorale*, Paris, 1902.

<sup>4</sup> Necker saw no way towards peace unless it were in convoking the *États*, to give the *Tiers État* a representation equal to that of both the others together. 'The old-fashioned deliberation by Orders not being changeable excepting by the agreement of the three Orders and the approbation of the King, the number of deputies of the Third Estate is not, until then, anything but a means of gathering all the useful informed minds for the good of the State, and it cannot be denied that this variety of information belongs above all to the Order of the Third Estate, since there are



The substitute for Divine Right, government based on a social contract of free and equal individuals, issued from the treatise of Jean Jacques to control administration and fill the pages of the new statute books.<sup>1</sup>

Thus, France under the *ancien régime* knew the Free and Equal voter less than England; her policy was founded upon an almost untempered monarchy and graduated subjection. But it was in just such an environment that the new doctrine could spring up. In the Germanic States the practice of distinct Orders was usual, where monarchy was at all tempered. The answer to the French doctrines, however, was that there should be representation of estates, for these, while supplying the advantage of representation, maintained the cohesion of the units in each Estate, whereas the free and equal vote inevitably disintegrated society.<sup>2</sup>

\* \* \* \* \*

The victorious principle was that every sane male citizen has a natural right to participate in government, that this right is normally

a multitude of public affairs upon which it alone is instructed, such as domestic and foreign commerce, the condition of manufacturing industry, the best means to encourage these, the public credit, the rate of interest, and the circulation of the currency, abuses of taxation, privileges and many other subjects within the experience of it alone. . . . The desire of the Third Estate, when it is unanimous, when it is in conformity with the principles of equity, must always be called the desire of the nation. . . . ' (*Résultat du Conseil*, 27 Dec. 1788. Cited Lavissee, *Histoire*, IX, 371).

Later came the *National Assembly*. Siyès declared: 'This title is the only one which is appropriate in the present condition of things, as much because the members which compose it are the only representatives legitimately and publicly *known and verified*, as that, finally, the *national representation, being one and indivisible (sic)*, none of the deputies, in whatever order he is chosen, has the right to exercise his functions separately from the present assembly.'

<sup>1</sup> In some provinces there was, before the Revolution, a species of representative assembly, occupied in voting subsidies, collecting them and administering their expenditure, the *États Provinciaux*. These, too, were composed of three Orders, whose privileges and interests were as distinct as those in the national estates. Nor were they representative in a strict sense, for the two upper Orders either came as of right, no election taking place at all, or some of their members attended regularly by virtue of precedence or status in the hierarchy.

<sup>2</sup> In some of the Germanic states there were occasional meetings of Estates; and here the practice of distinct Orders was usual. In Germany, the result of the French Revolution was not to cause the creation of Parliament or Estates based upon equal citizenship, but only to reawaken and spread the old-fashioned system.

The constitutional, but rather conservative, political theorists of the Reaction, when many young liberals of Germany looked upon the establishment of Estates as a great concession to liberal constitutionalism, agreed that these were representatives in the 'best sense of the word'. Cf. Schlegel, *Philosophical Lectures* (1804-6). Social cohesion was desirable; hostility undesirable. To secure cohesion and to ward off hostility the 'natural', 'organic', groupings in the State must be used for representative and co-operative purposes. The organic groups which should find representation were Peasants, Artists, Spiritual and Educational leaders, Warrior-Nobles (possessing land, in order to maintain the incentives proper to such a caste), and Servants (in a sense wide enough to include merchants). He returns again to the purpose of such a form of representation: that the corporateness of the State shall overcome disruptive stresses. 'Such an atomistic splitting-up of the whole body of the State, or of the national association (by the establishment of an assembly based on votes), is already an elementary dissolution, or leads directly and at once

represented by the right to vote for the representative assemblies, and that all are entitled to equal votes, none more, none less.<sup>1</sup> That right was independent of capacity and class, and was the direct issue of the humanity of man. This was a mystical dogma issuing from the affective qualities of those who held it, although they pretended that reason was on their side. This expression of the dogma contains practically all its essential features :

‘ All the individuals who compose the association have the inalienable and sacred right to participate in the formation of the law, and if each could make his particular will known, the gathering of all these wills would veritably form the general will, and this would be the final degree of political perfection. No one can be deprived of this right upon any pretext or in any government . . . in every society the associated are essentially equal in rights, and the first of these is participation in the establishment of laws under the empire of which they consent to live.’<sup>2</sup>

Common to all in the French Constituent, it was gradually hammered out into the form contained in the Declaration of the Rights of Man :

‘ Men are born, and always continue, free and equal in respect of their rights. . . . The nation is essentially the source of all sovereignty ; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it. . . . The law is an expression of the will of the community, all citizens have the right to concur, either personally, or by their representatives in its formation.’<sup>3</sup>

thereto.’ He observes also that the democracy of the medieval cities were based on corporations, the members of which were selected.

Such ideas, which were widely shared, were elaborated by Hegel, and by Adam Müller, the wisest and acutest of the Romantic theorists, in his *Elements of Statecraft* (*Elemente der Staatskunst*, 1809).

<sup>1</sup> Cf. French Declaration of Rights, 1789, 1791, Art. 6.

<sup>2</sup> Pétion, *Archives Parlementaires*, 1788–1789, III, 582.

<sup>3</sup> An earlier form which shows clearly the reasoning was :

Art. 17 : ‘ Since every man in the state of nature enjoys an absolute and universal right over himself, then society must possess over itself the same right, that is to say sovereignty resides in all the members of a society considered collectively.’

Art. 18 : ‘ Thus any society incontestably possesses every kind of power. It has always that of revising and reforming its constitution, that of making laws, of executing them, and pronouncing upon their violation ; that is to say in virtue of its sovereignty, it possesses eminently the legislative, executive and judicial rights.’

Art. 22 : ‘ The general will is never so well expressed as when it is that of all the citizens ; in default of this it must be expressed by the majority of votes.’

Art. 25 : ‘ Since all citizens ought to have an equal share in the advantages of society, they ought to exercise an equal influence in public deliberations.’

Art. 25 : ‘ Thus one of the principal points in a constitution should be the manner in which a people should assemble in order that it may, wherever necessary, express its wishes freely, clearly, easily and promptly.’—Gouges-Cartou Project, 12 August 1789, *Archives Parlementaires*, VIII, 429.

One practical reason did weigh strongly with the deputies, that is the desire to get a just distribution of the burden of taxation. Just taxation is a driving incentive in the creation of the dogma of equal suffrage, e.g. *Archives Parlementaires*, VIII, 432 : ‘ Taxation, being a portion taken from the property of each citizen, he has the right of deciding upon its necessity, of freely consenting thereto, of following its employment, and of determining its destruction, levy, collection and period.’

The principle developed in England during the political conflicts of the seventeenth century, a mighty tributary joined it in the American Colonies,<sup>1</sup> and later in the American States,<sup>2</sup> another flowed from the fount of the *Contrat Social*,<sup>3</sup> and all met, with the newer contribution of a few English radicals,<sup>4</sup> in the tempest of the Revolution, and thence spread to become everywhere the ideal of the weaker and poorer members of society. In all countries one can find a constitutional declaration of the principle,—in all except England, and this has its effects.

This conception of representation was necessarily entangled with the fundamental question of where sovereignty should reside, and since the governing classes were unwilling that sovereignty should go over to the people, every practicable obstacle was put in the way of full realization of the idea, so that only in our own day have universal suffrage and the Free and Equal Voter become coincident.

**Territorial Representation.** Now, here were a multitude of equal citizens. How were they to be represented? In some way a great gulf had to be bridged—the palpable gulf between each individual and the nation. According to the German theorists this gulf should never have been made, it did not really exist; and, even if it were tolerated, it should be overcome by representation in Estates which organically bound individual and group. But the disruptive, pulverizing philosophy of Locke and Rousseau had produced this gulf, and had suggested that it was surmountable only by the social contract.<sup>5</sup> The question still remained, how was the contract to be established in the everyday, continuous business of government? By what means could the reconciliation of all the particular wills be produced? As soon as this question was asked, and it was raised often and debated earnestly in the French National Assembly of 1789, statesmen were embarked upon a sea of troubles. There was the problem we have already discussed, that of Direct and Representative Government. There were the twin problems of the relationship between the constituencies and nation, and the electors and representatives.

If the nation were too large to be called together to deliberate, then the meeting must be reduced to manageable numbers, but nevertheless, there must be a proportionate expression of the national will.<sup>6</sup> Mirabeau's metaphor 'a map to scale' (*carte réduite*), indicates the

<sup>1</sup> Merriam, *American Political Ideas*, New York, 1920.

<sup>2</sup> Carpenter, *The Development of American Political Thought*, Chaps. III and V, Princeton, 1930; H. Kirk Porter, *History of Suffrage in the United States*, Chicago, 1918.

<sup>3</sup> Bk. IV, 2 and 3.

<sup>4</sup> Cf. Veitch, *op. cit.*

<sup>5</sup> Cf. Gierke, *Genossenschaftsrecht*, IV, 276–476.

<sup>6</sup> Mirabeau, *Oeuvres*, I, 8: 'When a nation is too numerous to meet in a single assembly, it forms a number of them. The individuals of each particular assembly give the right to vote for them to one person . . . the collection of representatives is the nation. . . .'

psychology of this form of representation, From each geographical point a person or persons to speak for its people must be called. This was a simple and convenient solution, and seemed natural, for it was based upon the postulate that all wills are of equal value and therefore one, or ten, or ten thousand, or any group of citizens, or any fraction of the nation, was equal to any other, if it were *numerically* the same. Men do not seek out difficulties, when their objects are obtainable without the burden of conquest.

Yet it could not be ignored that deputies coming from different places would have different views. Were they, then, to hold out for those views? If the convention that a locality had sovereign rights were adopted, serious difficulties would follow: the locality and the deputy would be encouraged in their intransigence.<sup>1</sup> Yet to deny sovereign rights was to fly in the face of revolutionary philosophy, by minimizing the political importance of all the sovereign individuals locally resident.<sup>2</sup> A way out of the dilemma was found in a convention as subtle as Rousseau's discussion of the General Will, Hegel's metaphysics of the State, and Gierke's analysis of associations (and all of these subjects are cognate to ours)—the convention that the representative of a locality must consider himself not as representing his district, but as representing the nation.<sup>3</sup> But if he is to do this, he ceases to be the representative of the district, unless, at the same

<sup>1</sup> *Archives Parlementaires*, VIII, 205: 'If the system of imperative and limited powers were admitted, the resolutions of the assembly would be stultified by the recognition of a formidable veto in each one of the 177 *baillages* of the kingdom, or rather in the 431 divisions which have returned deputies to the assembly.' Again: 'If any *baillage*, or simply a division thereof, could govern in advance the opinion of the National Assembly, it could, on the same grounds, afterwards repudiate its decrees, on the pretext that they were contrary to its own opinion' (Barrère).

<sup>2</sup> *Op. cit.*, p. 204: 'Each portion of society is subject; sovereignty resides only in the whole assembled: I say the whole, because the right to legislate does not belong to a part of the whole; I say assembled, because the nation cannot exercise the legislative power when it is divided, and then it cannot deliberate in common. This common deliberation can only come about through representatives; wherever I see the representatives of twenty-five million men, there I see the whole in which the plenitude of sovereignty resides; and if there exists a portion of this whole which wished to rise against the nation, I would see only one subject who pretended to be stronger than the whole. Protests and reservations are impermissible; they are attempts against the power of the majority' (Lally-Tollendal).

<sup>3</sup> *Archives Parlementaires*, VIII, 201: 'Firstly: what is a *baillage* or a part of a *baillage*? It is not an independent state, a state united to others simply by a few connexions, like any federal body; but a part of a whole, a portion of one only state, essentially submitted, whether it assents or not, to the general will, but having essentially the right to participate therein.—What is the deputy of a *baillage*? He is a man whom the *baillage* charges to will in its name, but to will not as it would itself will if it could be transported to the general rendez-vous, that is *after having maturely deliberated and compared among themselves* all the motives of the different *baillages*. What is the mandate of a deputy? It is the act which transmits to him the powers of the *baillage*, which constitutes him representative of a *baillage*, and thereby representative of all the nation' (Talleyrand-Périgord).

E.g. *Constitution of 1793*, II, Chap. I, Sect. 3, Art. 17: 'The representatives elected in the departments are not representatives of a particular department, but of the entire nation and they must not be given any mandate.'

time, the local inhabitants vote for him not because they are thinking of their district and willing the things which concern it, but because they have transcended the individuality which the philosophy of natural rights accorded them, and willingly vote as individuals who are part of a whole of which they are conscious. This, in fact, is the only practical way out of the philosophical difficulty raised by a political system which begins with individuals in a state of nature.<sup>1</sup> Individuals, in the terms of Kant, must be in a state of 'unsociability', but of 'social unsociability'.

Now if it were admitted that representation of the locality was not really representation of this, but of something else, called the nation—a fiction here invented to cause men to acknowledge an external authority—how was this something else to be known? Who should conceive the national interest or will—the deputy or his constituents? In other words, how far was the deputy to be free, and how far bound by 'instructions'? The constituents had a very important place in the scheme of things, for what was the national interest but some kind of combination of the interests of all the localities?

It is one thing to attempt to answer these questions as an 'ought' in an ethical vacuum, another to read the answer from history. When a desirable solution was being discussed each party to the arrangement regarded the matter in the light of what was desirable to *him*. Representatives were not anxious to be bound by mandates, they desired independence and security of tenure.<sup>2</sup> They could not forget that, on the whole, they had a better education and more leisure than most of their constituents, whence some of them argued that they were better able to decide what was their will.<sup>3</sup> Further, it was asked, how could a constituency know what was the national will, and state its attitude thereto, until the deputies met and deliberated?<sup>4</sup> On the other hand, politically conscious electors desired to give instructions,<sup>5</sup> shorten the duration of the representative period,<sup>6</sup> and recall the members who dissatisfied *them*. Such devices of the electors were the

<sup>1</sup> *Archives Parlementaires*, VIII, 593: 'The deputy of a *baillie* is immediately chosen by his *baillie*; but indirectly, he is elected by the totality of *baillies*. That is why every deputy is a representative of the whole nation.'

<sup>2</sup> *Ibid.*, p. 207.

<sup>3</sup> *Sièyès, Archives Parlementaires*, VIII, 594.

<sup>4</sup> *Ibid.*: 'Here there is no question of drawing up a democratic survey, but to propose, listen, concert among ourselves, to modify one's opinion, finally to form in common a common will. . . . When we meet it is to deliberate, to know other people's opinions, to profit from reciprocal views, to confront particular wills, to modify, and conciliate them, to obtain a result common to the majority.'

<sup>5</sup> *Monnier, ibid.*, VIII, 560: 'The people confides its sovereign power—in so far as it confides it it cannot exert it; but it can take it back whenever the depositories abuse it in order to oppress them; and when it recalls the power, it should return it as soon as possible with new precautions to assure its liberty and happiness.'

<sup>6</sup> *Merriam, A History of American Political Theories*, New York, 1926; and cf. the various declarations of rights in the American State Constitutions of the revolutionary period.

only means of controlling the representative assembly in an age which lacked two things which to-day exist in a highly efficient form—rapid transport and communications, and a party system—an organization specifically to connect the electorate with its representatives. Hence, therefore, the importance of such communications as the letters which passed between Burke and the Sheriffs of Bristol, and the strict views held in America and France on the subject of the responsiveness of the representatives: in default of any other body to whom to be responsive and responsible, either the locality was the controlling factor or the representative was virtually free. The development of communications and the party system has caused the representative system to change its meaning and forms. Of critical importance, further, to the meaning of representation has been the growth of great organized bodies of citizens in their economic callings and social pursuits. This subject is pursued further at a later stage.

**Who may vote?** The right to choose representatives was extended from time to time in the nineteenth century and recently, until practically all males and females over 21 are enfranchised. Over one hundred years of struggle were needed to secure this, although there was a widespread consciousness of the importance of the vote at the beginning of that time. But those in possession of political power realized that concessions would mean its total loss, and therefore only violence or the fear of violence could overcome this unwillingness. This fear itself was of small effect while the disenfranchised were unorganized, and even when they were organized so long as they were unwilling to act violently and the minority controlled the armed and disciplined forces. Therefore concessions were piecemeal and slow. In England the Reform Bill of 1832 was passed only after violence, threatened and actual, after a concerted attack on the credit of the Bank of England, and a threat to dilute the blue blood of the peerage by 'swamping' the House of Lords.<sup>1</sup> This was the consummation of a long and bloody skirmish since 1815. The Chartist movement with its warlike demonstrations followed. Once the Act of 1867 was passed politics were radicalized, and the poorer classes naturally admitted their unenfranchised brethren. French development<sup>2</sup> was marked by actual and recurrent revolution. In Germany, the movement was pent up until the Revolution of 1848, which, proving abortive, accomplished no more than a declaration of universal suffrage. This was granted by Bismarck only as a price for support of his policy of unity.<sup>3</sup> This gift, however, was made to Germany and not to Prussia, and, until 1919, Prussia possessed a type of franchise especially designed

<sup>1</sup> Butler, *Passing of the Great Reform Bill*; Trevelyan, *Lord Grey of the Reform Bill*; Wallas, *Life of Francis Place*.

<sup>2</sup> Duguit and Monnier, *Lois Constitutionnelles*, Paris. Introduction.

<sup>3</sup> Angst, *Bismarck's Stellung zur Wahlrecht*.

to hold the masses in subjection.<sup>1</sup> Circumstances did not favour violent revolution until 1919, and this alone, in Prussian conditions, could produce universal suffrage.<sup>2</sup>

The Prussian system<sup>3</sup> contradicted the contemporary experience of the Western world in so many points that it emphasizes (by contrast) those features now almost universally accepted, and it explains, also, the queer nature of German policy before the War, for Prussia was the dominant partner. The system was indirect and unequal, in contrast to direct and equal, suffrage. It was indirect in that the electors did not possess the right to vote immediately for their representatives in the House of Deputies, but the 'original' electors (*Urwähler*) were only entitled to choose final electors (*Wahlmänner*) who then elected the deputies. The effect of organization by political parties, however, was to cause the election of those 'final' electors who were known and pledged to elect representatives desired by the original electors. But the 'original' electors had no *equal* right to choose the 'final electors': their elective power was graded according to the amount of direct taxation paid. There were three classes of taxpayers—all in the constituency who paid the first one-third of the direct taxes in order of amount comprised the first class, then came the second class including the taxpayers in descending order until the line of two-thirds in total was reached, and a third class contained the remainder. Hence the term Three-Class System. This distribution of voting power caused, by the standard of equal suffrage, a serious distortion of representation,<sup>4</sup> for approximately, a voter in the First Class possessed about four times the parliamentary power of the Second and over sixteen times that of the Third Class.

A noteworthy effect of this system was to reduce the electoral interest of all the three classes of voters—for the top class thought it unnecessary to go to the poll, while the other two thought it useless.<sup>5</sup> Even the oft-demonstrated electoral strength of the working-class, even its services during the War, failed to move the rulers to more than vague promises of reform, and, in fact, the people obtained electoral power only when they violently took it in the Revolution of 1918. The defenders of the system used the subtle argument that

<sup>1</sup> Cf. Lassalle, *Offenes Antwortschreiben an die Arbeiter*, Feb., 1863, IV; *Works* (ed. Berlin, 1920).

<sup>2</sup> Bergsträsser, *Die preussische Wahlrechtsfrage im Kriege*, 1929.

<sup>3</sup> Cf. Gerlach, *Das Parlament*; Barthélemy, *Institutions Politiques de l'Allemagne Contemporaine*.

<sup>4</sup> In 1908, for the whole of Prussia, the first class contained 293,000 electors, the second, 1,065,000, the third, 6,324,079; in 1913 (cf. *Statistisches Jahrbuch für den Preussischen Staat*, 1914, XII, 634 ff.) the percentage of the electorate in the three classes was I, 4.43; II, 15.76, and III, 79.81. Cf. Schippel, *Fort mit den Dreiklassen Wahlsystem*, Berlin, 1890; Jastrow, *Das Dreiklassensystem*, Berlin, 1894; and Bock, *Wahlstatistik*, Halle, 1919. Cf. also Scheidemann, *Memoirs, passim*.

<sup>5</sup> In 1913, Class I, 51.4 per cent.; Class II, 41.8 per cent.; Class III, 29.9 per cent. of the electorate voted. This was in every case higher than at previous elections.

only property-owners ought to be represented because they alone had property : or, in other words, they could not risk the transfer of their property to others by being outvoted.<sup>1</sup> But this, again, was also a defence of the Hohenzollern monarchy, which could not have survived in a state based on universal franchise ; and the monarchy was a bulwark of the social and political privileges of the upper classes, and these, especially the Junkers, the larger farmers, who obtained about one-third of the membership of the House,<sup>2</sup> were most attached to dynastic despotism. *The callous injustice of this system accounts for the ardent, even doctrinaire spirit, with which the constitution-makers of 1919 embraced all the known, if untried, devices, for equitable parliamentary representation.* From one extreme to another, is one of the most frequent rules of political development.

The main qualification for the franchise in the nineteenth century, that which limited the numbers enjoying it, was the possession of property. Two main reasons were advanced for this : one was that the possession of some property was a trustworthy indication that its possessor was educated, and therefore competent to pronounce upon public affairs ; the other was that if those who had no property were enfranchised there would be an end of private property. The first was advanced by such otherwise different minds as Hegel and Bagehot, and Disraeli, and members of the French Revolutionary Convention. That so crude and erroneous a test was acceptable to such minds (when in good faith) shows how difficult it is to measure political competence ; but this acceptance is, at least partly, due to the difficulty of defining and applying a more accurate one to multitudes of people.<sup>3</sup> Further, and from this point of view and this only, there was something to be said for it. Until about 1900, very few citizens in any country had the means of education, and the lack of private means implied a lack of education. Now, it is necessary to representative and responsible government that the electors shall be able to understand their own interests, the interests of the nation, the policy of a candidate for their suffrages, and the nature of parliamentary activity ; for without this there is no judgement ; yet the essence of responsible government is popular judgement. The real

<sup>1</sup> Cf. *Der Preussische Landtag kein Klassenparlament*, by Julius Vorster, a member of the House of Deputies (Cologne, 1907).

<sup>2</sup> Cf. Kamm, *Abgeordnetenberuf und Parlament* (1927). Cf. Rosenberg, *Entstehung der deutschen Republik* (1928), Chaps. I and II. The great change in representation was due partly to the redistribution of seats—until 1919 distribution rested upon a decree of 1867 when rural parts were more thickly populated than towns : a situation which changed remarkably after 1870. Cf. also Dawson, *The German Empire* (1919), I, 387, 388. In 1913 party strength (percentage) was : Conservatives, 45·6 ; National Liberal, 16·5 ; Democrats, 9·0 ; Centre, 23·2 ; Social Democrats, 2·3. In 1919, with direct, equal and proportional representation, it was respectively 12·5 ; 5·2 ; 16·2 ; 21·9 ; 42·1. See particularly Bock, *op. cit.*, which is a careful analysis of the meaning of Federal and State election statistics from 1871 and 1913.

<sup>3</sup> Cf. Barthélemy, *Problème de la compétence dans la démocratie*.



question, however, is whether people can exercise such a judgement without formal education. It is a mistake to imagine that formal education is absolutely essential, for we are often taught more by the informal, sometimes the chance, experiences of life, than by schooling. This is not all. It is a fundamental fallacy to argue that political behaviour has depended, depends now, or must depend upon instruction; it depends upon will, upon the passions, at the most modified by instruction, and men and women vote primarily for what they want and not from sheer intellectual choice. Thus, it is a fallacy to believe that the poorest, the most ignorant, ought not to vote, because they will not know what to vote for—they know very well, even too well. The real question, of course, is not whether people know what they *want*, but whether they know what is *possible*. There, education is vital; and we analyse the question later.

**Educational Qualifications.** In most countries, then, the property qualification has been reduced to very small proportions or has ceased altogether, no more than mere residence for a short period being required as a preliminary to registration as a voter.<sup>1</sup> When property qualifications were attacked, the defenders (in all countries) of the theory of government by the competent suggested the establishment of educational qualifications,<sup>2</sup> but it was found practically impossible to devise a valid scheme, and statesmen ultimately surrendered to the principle of mere citizenship. But a number of the American States have educational tests. They are simple tests: mere ability to read being required in some; others require the reading of the Constitution and the writing of the applicant's name; one—Mississippi—requires either the reading or the explanation of the Constitution. These tests were hardly established for the sake of an ideally good democracy, but in twelve states at least, to procure specific exclusions from the electorate.<sup>3</sup> In the eight Southern States the intention was to exclude negroes—and this has been done, since the standard of success at an examination is not set by the candidate but by the examiner-registration-officers, who are white. In four New England States the alien population fell too easy a prey to corrupt bosses to be permitted by the 'forward and

<sup>1</sup> In England, owing to the non-statement of the rational theory of representation in constitution or statute, voters had as many votes as positive qualifications. This resulted in much *plural voting*. The Reform Act of 1918 permitted, at most, two votes per voter to be chosen among the qualifications of residence, occupation and university degree. In 1931 it was estimated that there were about a half a million plural votes (statement of Home Secretary in debate on the Electoral Reform Bill, 1931.)

<sup>2</sup> Cf. Lowes Dickinson, *Development of Parliament in the Nineteenth Century*; Barthélemy, *L'organisation du suffrage et l'Experience Belge* (Paris, 1912); Smend, *Massstäbe der Repräsentation*.

<sup>3</sup> Brooks, *Political Parties and Electoral Problems*, 1923; Sait, *American Parties and Elections* (1927); F. G. Crawford, *The New York State Literacy Test*, Vol. XVII, *American Political Science Review*, May, 1923.

upward-looking citizens' to come upon the register without a test. At any rate the tests are not any serious contribution towards the problem of electoral ability: they are pawns in the battle for social dominion, and exclude those who are considered heterogeneous on account of race or culture.

The fact is that competence is a very elastic term: it cannot be defined to the universal satisfaction, or even to that of a majority of the people. Since it is not exactly definable, the prospects of difficulties in its administration stop those who are attracted by such a standard from its institution. Nor is the impersonal test which could be devised for intelligence and intellect any criterion by which to judge the *moral* excellence of an elector or a candidate. This is entirely a subjective matter, itself in the very cockpit of politics; for what shall be considered moral in a nation's life is in the modern state to a large extent settled by law. It is difficult enough to the scientist to certify unsoundness of mind, or prescribe the treatment for a juvenile delinquent, and when one arrives at the finer shades of moral rectitude one is baffled. It is exactly this uncertainty which has given birth to democracy and representative government: while the conviction of certainty has often given rise to minority and despotic government. The grave responsibility of placing even the queerest shade of idiosyncrasy beyond the bounds of potential validity has caused men both to offer and demand the inclusion of its opinion and weight in the law-making assembly.

Neither can there be an objective test of *wisdom*, which means judgement of the importance attachable to the various elements of a problem. This is certainly compounded of testable information, but its chief ingredients are intuitions, desires and sanity of mind. But the democrat would say that such things are sacred. *Knowledge*, however, can be tested; and it is here that democracy is most defective. A thorough knowledge of social affairs is fundamental to any *real* enfranchisement and sound decisions. Let us not pretend that uninstructed instinct can answer social and economic problems: it may be lucky or it may be disastrous, but it cannot be wise. Even then, we are unable either to teach or test knowledge indefinitely: Science grows richer every day, but knowledge is still woefully lacking. When we reach that margin we inevitably shall, and do, set our course by large and imperfect socio-psychological generalizations; though Science teaches caution. Equally, there is no doubt that tests based on knowledge now available, and indispensable to rational voting, would exclude some 95 per cent. of all adults from the franchise.

Thus, excluding race and sex discrimination, only the automatically distinguishable defects like bankruptcy, culpable pauperism,<sup>1</sup>

<sup>1</sup> In Germany including drunkenness which endangers economic independence. The destitute are not disfranchised in England, France or the U.S.A.

certified mental deficiency,<sup>1</sup> criminality, now cause exclusion from the franchise; nor are the armed forces permitted to vote.<sup>2</sup>

Until recently female sex was an almost universal exclusion from the vote; women are still not permitted to vote in France, Italy and many other, especially Latin, countries.<sup>3</sup> Female disenfranchisement arose out of no rational consideration of woman's need to participate in political activity, but out of the general social position of women, as determined by sexual passion, family life, and religious tenets.<sup>4</sup> It was assumed that man was, or should be, the head of the family, and the lord of women; and that woman's place was the Home; and hence it followed that women were 'represented' in politics by their husbands. They were put off with cant about their beauty and modesty. But with the insistence of Natural Rights theories upon the uniqueness of individual experience, women found a way into political life. Among the pioneers of reform were men like John Stuart Mill and Charles Bradlaugh, not Christians in the ordinary sense of the word. The mass of men, securely installed in authority, were proof against argument, until women formed militant organizations and worried and shocked them out of their domineering complacency. Some statesmen have ascribed their conversion to the efficient services of women in the Great War. We cannot entirely exclude one other consideration: party competition to bid for the votes of the newly enfranchised.<sup>5</sup>

Our experience of universal suffrage is too short to enable us to say in what fashion the intervention of women has affected politics, or to make an accurate forecast. No country has general arrangements for keeping a separate record of the votes of men and women. Germany has, since 1919, legally provided for separate ballot-boxes, but the power is left to the constituencies, and only an inconsiderable number have used it.<sup>6</sup> The results show votes almost identical in quality with those of men, except that women vote less than men (non-voting is greater among the younger women) and there is a slight

<sup>1</sup> This is not easy to define and establish. Only this extreme limit serves to disfranchise, mental and moral weakness otherwise does not. Cf. Barthélemy et Duez, *Droit Constitutionnel*, p. 274 ff.

<sup>2</sup> So for France, Germany, U.S.A.; not so in Great Britain.

<sup>3</sup> In France politicians are particularly afraid of the power which the clergy would win by their influence over the women. Cf. Leclère, *Le vote des Femmes en France*, Paris, 1929.

<sup>4</sup> Lecky, *Democracy and Liberty*; Ostrogorski, *Rights of Women*; J. S. Mill, *The Subjection of Women*; Mary Wollstonecraft, *A Vindication of the Rights of Women*.

<sup>5</sup> A critic of the German Constitution of 1919, which enfranchises all women and men over 20, raises the quaint protest that if it was difficult enough to accept the equality of voters (and hence the majority principle) when only men were voters, the convention entirely breaks down when one is counting women who have the vote, for they of a certainty are different from men. Freytag-Loringhoven, *Die Weimarer Verfassung in Lehre und Wirklichkeit*.

<sup>6</sup> The power is derived from *Reichstimmordnung*, para. 5, established principally in order to make reference to voters' names easier.

bias to the parties of the Right, and German politicians explain this by the aversion of women for the progressive and Socialist parties, which on the Continent make of atheism and ungodliness a party religion.<sup>1</sup>

In the course of parliamentary proceedings women members have everywhere shown special interest in health, housing, temperance, social pensions, education, equality of economic conditions for the two sexes, international peace and the white slave traffic. It is the *intensity*, more than the direction, of their interest which is important.

The wholesale entrance of women into politics must inevitably introduce complications, owing to the contact of different sexes. No one who has an experience of co-education and co-operation in industry can avoid the conclusion that the minds of men and women are often diverted from objective considerations and are seriously affected by considerations of courtesy and the personal beauty and desirability of one of the opposite sex whose fate or interests are involved. Boys and girls tell lies for each other, and pass up work in some one else's name; pugnacity is aroused in the presence of girls and discipline is audaciously rejected because it is humiliating. Time is wasted in philandering, and the mind loses itself in vain fancies. In business, people are often shielded from responsibility because of their sex, they are appointed because they are pleasing, they are dismissed or passed over in promotion because they are ugly. Women become extraordinarily devoted to their work because they are devoted to a particular manager, and work badly for others in the firm. We all know such facts, and they should not escape us in public life.

<sup>1</sup> Cf. Huber, *Die politischen Wahlen in Köln in den Jahren, 1919-26*, in *Kölner Verwaltung und Statistik*, Band VI, Heft 1 and 2, Cologne, 1927; Woytinsky, *Die Welt in Zahlen*, Vol. 7, pp. 42-4.

The conclusion is rather distorted by the fact that Cologne is a notably Catholic locality. Twenty-seven per cent. of the male voters and 44 per cent. of the women voters voted for the Catholic List in the 1924 elections. Yet the voting in Thuringia, almost entirely Protestant, in 1925 for the Reich President showed a preponderance of the women's vote for the conservative parties; and in 1930, the Reichstag elections showed these results—for every 100 votes cast by men the women cast: for the Socialist Party, 103·8; the German Nationals, 147·1; the Centre, 137·2; the Christian Social People's Service, 232·9; Communists, 81·2, and National Socialists, 90·8. Cf. 'Die Reichstags Wahlen Vom 14 September 1930', in *Bericht des Thüringischen Statistischen Landesamt*, 1930, Nr. 3, p. 109. Further, in the Referendum on the Expropriation of the Princes' Fortunes in 1926, where abstention from voting was sufficient to kill the proposal, the men's vote alone would have carried it—there were more abstentions of women than men, and the combined votes were just insufficient to expropriate. The Churches were unanimously against expropriation. But separate ballot-boxes were kept for only fourteen constituencies out of thirty-five. Cf. further, Koellreutter, *Reichstagswahlen und Staatslehre*, p. 27, goes so far as to surmise that certain parties, e.g. the Centre, are 'Women Parties'. Cf. his footnote No. 61, where the election results for 1930 for Cologne, Frankfurt-am-Main and Ratisbon are given: the Centre Party obtained between 60 and 70 per cent. of women's votes, Social Democrats and middle parties about 50 per cent., and National Socialists obtained about 8 per cent. more than the Communists.

And although the vast majority of people in a representative assembly, its committees, and the ancillary organizations, may be married, and, therefore, presumably (but *only* presumably) less susceptible to the charms and wiles of the opposite sex, everyday experience teaches us to expect results. They cannot as yet be foreseen : but we are justified in thinking that the Mediterranean will suffer more difficulties than the English-speaking nations : for their conventions of sex and marriage differ markedly.

Something of this may be fundamentally at the root of the French refusal to enfranchise women ; and because it is so fundamental it is least broached in contemporary controversy in that country. Parliamentary committees and particularly those of the Senate which still live in the memory of the State and Church struggle, have rejected the enfranchisement of women on the ground that this would cause the domination of French government by the Catholic Clergy. This is true ; but the vote would perhaps ultimately break the Church by confronting it with the most bitter civil problems.

Two other things are worth insisting upon in regard to qualification for voting. One is that all countries, save Russia, accord the vote only to their *nationals*, i.e. those who have acquired citizenship of a particular state by birth or naturalization. This is one of the directions in which the sense of nationality, i.e. the sense of a collective whole with special rights and duties among its members and less tolerance towards alien collectivities, is expressed.

We must also notice the extent to which race affects the right to vote. In the U.S.A. almost the whole negro population is excluded from the vote either by convention and fear of violence, by complicated and impossible requirements, or by administrative discrimination based upon 'educational' tests. Other, more blatant means of exclusion have existed, but have been declared unconstitutional.<sup>1</sup> In Europe national 'minorities' lodged against their will in alien states are frequently obstructed in their rights to vote, and in Germany, at least one party, the National Socialists, are prepared to withdraw the franchise from all Jews by race. (Not by religion—for this they hold to be less detestable than racial features.)

**The Age-qualification.** The age-qualification for voting is almost everywhere coincident with that of the legal majority, though some countries set the age at lower than twenty-one and others higher.<sup>2</sup> I have nowhere met with a rational argument concerning the proper age to vote : it has been stumbled into without adequate consideration. Since Natural Rights doctrines concerned

<sup>1</sup> *Sait, American Parties and Elections*, Part I, Chap. II, gives an admirable account of the law and practice : A certain number of poor, illiterate whites are accidentally excluded because they cannot come up to the residential, tax-paying or educational standard.

<sup>2</sup> See footnote 1 on next page.

the 'citizen', and the citizen was a man at his legal majority, the latter seems to have been accepted without examination. Argument has, in fact, been supplied only by those who take exception to the age of twenty-one. In Russia,<sup>2</sup> where the age of eighteen was established, it was argued that economic productivity is a proper title to representation. Those who have set the age, or desire to set the age, above twenty-one, insist that the mind is not yet sufficiently mature to deliver a sound judgement upon political issues, and that the youthful mind is too apt to vote for radical measures and enthusiastic, but shallow-minded, personalities.<sup>3</sup> We can never know how far these theories are true since the basis for statistical analysis is lacking. We need only observe that, on the whole, the intensely radical members—the Communists and Fascists—have received little support; and in Germany, where Extreme Right and Extreme Left were favoured in the elections of September, 1930, there is an ample explanation in economic misery and foreign oppression.<sup>4</sup> If experience may be held to teach, it seems to be a better arrangement to initiate youth into politics as early as possible; and the initial radicalism must be suffered in the hope that the extra period of voting experience will give a compensatory poise in later life.

No country in the world has yet thought of denying the franchise on the grounds of old age.

Country.	Voting Age.	Age of Candidature.
<sup>1</sup> Russia . . . . .	18	18
Turkey . . . . .	18	30
Argentina . . . . .	18	25
Mexico . . . . .	18	
	(if married, 21 if unmarried)	
Switzerland . . . . .	20	21
Germany . . . . .	20	25
Italy . . . . .	21	25
Canada . . . . .	21	21
Czechoslovakia . . . . .	21	30
Austria . . . . .	20	30
Poland . . . . .	21	21
Belgium . . . . .	21	25
France . . . . .	21	25
Britain . . . . .	21	21
U.S.A. . . . .	21	25
	(all States)	
Norway . . . . .	23	30
Finland . . . . .	24	24
Spain . . . . .	25	25
Japan . . . . .	25	30
Denmark . . . . .	25	25
Holland . . . . .	25	25

<sup>2</sup> Cf. Timaschew, *Staatsrecht Soviet Russlands*.

<sup>3</sup> E.g. in the debates of the German National Assembly, 1919, especially the contentions of the German National Party and the German People's Party.

<sup>4</sup> Cf. Dix, *Reichstagswahlen und Volksgliederung* (1930).

## CHAPTER XII

### REPRESENTATIVE GOVERNMENT IS PARTY GOVERNMENT

**M**ODERN States, then, are ruled by the representatives of all their citizens, male and (often) female, of an age about twenty-one and over; these citizens being qualified by little more than their mere existence as indicated by residence, and practically no distinction being made on the grounds of property or ability. The voters are by law grouped territorially and in no other way, the notion of the representation of 'interests' and Estates having been overcome by that of the representation of the nation through equal electoral districts. The question now is what this system has achieved, and what its future is likely to be. This question cannot be answered without attention to others which arise out of it:

(1) Who nominates candidates for election as representatives?

(2) What influences are brought to bear upon voters and candidates in order to affect the result of election?

There is no answer to these questions without an examination of the rôle played by Political Parties in representative government. It is difficult to analyse that rôle without the danger of losing a view of the integral function of Party; but this difficulty attends all scientific analysis. We may say, then, that the function of Political Parties has two main aspects: the organization of the electorate, with the purpose of obtaining a majority, and the maintenance of continuous connexion between representatives and constituencies from one election and another. These processes are intertwined: they have a common end. However, though not separate, they can be distinguished. Here we discuss the first, and, in the later chapters, the second.

**Nomination.** Yet, first, we should observe that various countries have made the age of candidacy as a representative higher than that of voting.<sup>1</sup> It is the distinction marked, on the Continent, between the *active* (the right to choose) and *passive* (the right to be chosen) franchise. The grounds are plain: legislators believed that greater

<sup>1</sup> See Table, p. 415, *supra*.

maturity was desirable in the persons who actively govern, than in those who merely choose representatives. It seems to me, however, that if there is any validity in universal suffrage and representative government there is no practical ground for the distinction. For if the people are to be truly represented they must be able to judge of alternative policies and the respective capacity of candidates, and the mind—from the standpoint of age—that can do this, can be trusted to do as much to make laws as the average member of parliament in fact does. The rule goes too far, or not far enough. There are disqualifications (beyond those which exclude from the franchise) for candidature: in France (*inéligibilité*) naturalized foreigners for ten years after naturalization, those who have not satisfied military obligations, active army and navy, undischarged bankrupts, candidates and electors found guilty of corrupt practices, officials local and central under varying conditions; in Germany, there is only one condition, 'naturalized for one year.' In England, there are 'incompatibilities' as the French say, which exclude certain people from parliament, but not from election—this we discuss in the Chapter on Parliament.

The law requires that a certain number of electors shall subscribe the nomination of a candidate, and it steers between the ideals of ease of candidature<sup>1</sup> and preliminary assurance that the candidature is not entirely frivolous. Both these points are of importance, but the latter has acquired special significance in recent years, because the efficacy of representative government has come to depend so much upon the stability of the executive and, therefore, of party organization, that undisciplined candidatures which disturb party affiliations and upset 'straight fights' between majority and minority are widely deprecated. In England, candidates are required to deposit £150<sup>2</sup> with the Returning Officer, and this is lost if the candidate fails to secure one-eighth of the votes cast in his constituency. It is doubtful whether this makes much difference; though it probably has the effect of diminishing the number of Communist candidates, and candidates of various propagandist societies, who would stand, not to win, but to advertise their doctrines. In other countries the law requires candidates to be sponsored by a number of electors who sign the nomination form: thus in England eight electors, in France one hundred, in Germany only twenty, provided that the party organization gives sufficient proof that it has at least 500 supporters, and one such proof is the winning of at least one seat at the previous election.<sup>3</sup>

<sup>1</sup> Bosc, *La Réforme du mode de scrutin* (1920); Bernard, *La Liberté de la Candidature*, Paris, 1925.

<sup>2</sup> Cf. Rogers, *On Elections*, 20th ed., London, 1928, II, 64.

<sup>3</sup> Cf. *Begründung*, Law of 24th August 1918, Art. 6 (No. 1288 of 1928): 'All proportional representation systems agree in the requirement that nominations must be endorsed by several persons, so that only seriously meant nominations shall be



**The Local and the Central Caucus.** The main point, however, is: who actually nominates the candidates? The law, excepting in the U.S.A., does not intervene, and nomination is left to the voluntary arrangements of the voters. Now it is clear that candidates are nominated because they and their supporters hope to win the seat, and, to do this, an organization to attract the attention of electors is necessary. As soon as the constituency becomes so large in area and number that a candidate cannot be known to all in person, a means of approaching the electors must be established. The necessity grows in proportion as the citizen's time available for political reflection is reduced by preoccupation with family duties and economic pursuits: for then the candidate must not only break through the barriers of territorial distance but must overcome the resistance of the voter's fatigue, ignorance and lack of interest. In the modern state, constituencies contain very large numbers of inhabitants,<sup>1</sup> they are extensive in area, and in spite of the advanced condition of industrial technique and the means of travel between home and workplace, the voters' daily toil exhausts them. They certainly show no signs of wishing to reduce their standard of living by absence from work for the sake of politics. This set of obstacles the candidate must overcome; but this he cannot overcome without an organization. Such organizations first grew up to help the candidate,<sup>2</sup> they were later transformed to help the electorate also. But they were always established with a particular system of political principles in mind. Citizens founded local caucuses, or local party organizations, and arrogated to themselves the power to select candidates. Their justification was their intention to serve their principles and their candidate. Selection by such bodies does not preclude other electors from acting similarly, but experience has shown that there are all too few citizens sufficiently conscious of their political powers to cause embarrassment by select-

made and so prevent any casual adventurer or imperceptibly small group with inessential separate wishes from producing a harmful scattering of votes and thereby confusing and enhancing the difficulty of the electoral process.' Severer regulations than this have been declared unconstitutional by the Supreme Court of State of Germany. Cf. Kaisenberg, *Die Wahl zum Reichstag* (1928), pp. 8-13.

Country.	Average Number of Inhabitants per Constituency.
<sup>1</sup> Great Britain (S.M.) . . . . .	70,000
France (S.M.) . . . . .	65,000
Germany (P.R.) . . . . .	1,800,000
U.S.A. (S.M.) . . . . .	210,000
Belgium (P.R.) . . . . .	250,000

S.M. means single-member constituency; P.R. means proportional representation.

<sup>2</sup> Cf. Ostrogorski, *Democracy and the Organization of Political Parties* for the U.S.A. and England; further, Robinson, *The Evolution of American Political Parties*, and Porritt, *The Unreformed House of Commons*, and Greg, *Parliamentary Elections in the Old Days*. For Germany, see Bergsträsser, *Geschichte der politischen Parteien Deutschlands*, and the history of special parties, e.g. Bachem, *Zentrumsparthei* (the first two volumes), and others mentioned, *infra*.

ing excessive numbers of candidates. Still, with universal and equal suffrage, such embarrassment was and remains a possibility. [A distinction between English and Continental, and American, parties must be remembered—the former fight for principles of public policy, the latter much more, though not entirely, for ‘spoils’. The distinction will become clear as the facts are unfolded throughout the rest of the book.]

The local caucus desires to obtain the realization of its political principles—in other words, to govern other people. There is no certainty, however, that it will succeed unless its representative forms part of a majority of like-minded people. The need for a majority, therefore, causes candidates for office, local bodies of citizens, philosophers, and would-be leaders, to seek each other out, to form a homogeneous policy, and act in concert. In other words, they seek to discover the conditions of power before they proceed to fight for it; lest by not knowing them, they waste their efforts upon a representative who insists more upon his idiosyncrasies, than his solidarity with others. The result is the creation of Political Parties, that is, the association of men and women who broadly agree upon the principles of government and their application, in Burke’s definition of a party: ‘a body of men, united for the purpose of promoting by their joint endeavours the public interest, upon some principle on which they are all agreed,’ or in a modern German definition, ‘a battle-fellowship established in the form of a permanent association, to obtain power over the State to realize political aims’.<sup>1</sup>

It is essential to a party’s objects that it should extend beyond the boundaries of a single constituency, and some modern Parties do, in fact, spread over whole nations. This at once raises various questions of centralization and localization, an important one being that of the selection of candidates.

In England, about 1800, the choice was mainly local, with small central interference, loyalty to party-principles being secured by a statement made by the candidate in answer to interrogations from the few sponsors and the judicious rise of office and bribes. Gradually, after the Reform Bill of 1832, the large and continuous increase of the electorate compelled more deliberate and concerted organization, and the politicians of the Clubs, the Carlton and the Reform, the private secretaries to Cabinet Ministers and Opposition leaders, and later, the central Party Agents, became the advisers of the local associations. The arrangement was convenient and useful, because in England, differently from the U.S.A., neither law nor custom required that the candidate should be a resident of the constituency; so that a central reservoir of candidates was possible, and the source being centralized, it was possible to compare candidates with one another and with the different needs of the constituencies. The

<sup>1</sup> Cf. Triepel in *Staatsverfassung und politische Parteien*, 1930.

central agent was then able to advise the local associations which had no candidate of their own. But it was advice only, and even now continues, in the main, to be only that, though it is very influential and often enforceable.

**The Party a Fellowship.** The conditions under which such advice is given have greatly altered since the middle of the nineteenth century. For the Party has acquired the character of a distinct and conscious Community. A feeling of unity now pervades the aggregation of local bodies; they recognize that they are ultimately parts of a single thing, deriving significance from a place in a system, composed of creative purposes and defensive and offensive impulses against hostile groups. What caused the growth of this feeling? The experience of corporate struggle, victory and defeat; the exercise of governmental power; the influence of a succession of leaders whose personality and fame had that aura which produces loyalty and worship; the moving quality of significant causes; the growth and operation of centrally-directed propaganda based upon large funds of money; the newspaper reiteration of creeds; and finally, the growing consciousness of the individual voter that the Whole—the Party—is mightier than its parts—the local associations. Victory is the first law of politics, and to this end, all other laws are subordinated. If victory is more certainly attainable by centralization, then party-organization is centralized.

Centralization has triumphed, though this does not mean that local liberty has ceased to exist. The conditions of successful war are well known. Power must not be wasted, since how much will be called for cannot be exactly predicted. Therefore, there must be no quarrels within the camp, and pugnacity must never be turned inward, but always outward. Hence local supporters of the same party ought not to fight each other: one candidate for one seat is enough. To quarrel, especially on the eve of battle, is to discourage one's own supporters and to suffer defections, while encouraging the enemy. If, then, quarrels cannot be avoided, the intervention of a higher authority which can impartially represent the loss to the whole community is desirable: it will ask for a sacrifice of the less important to the more important; a suppression of the relatively undesirable to avoid the absolutely undesirable, namely the defeat of the party by a victorious opposition. Further, all strategy is one: forces must be concentrated where opposition is greatest and not wasted on gloriously winning one's own strongholds. If this is to be accomplished, a skilled organization, a General Staff, must concentrate information and material about the whole of the Front, and distribute it according to local need.

The Party is a fighting organization, and it must obey the rules of successful warfare.

One of those rules is that the central directing agency must watch over the quality of the local candidates, and with the growth of Party unity and the knowledge of the rules of success, the central office has acquired a good deal of power in the matter of Nominations.

Local associations may insist upon their own candidates. Unless there is a really serious reason why they should not be adopted, they are 'endorsed' by the central office.<sup>1</sup> Endorsement means that the central office approves of the choice and will help that candidate during the campaign. The local association may have no person considered clever enough to meet its standard for a member of Parliament, or may lack the special qualities needed to win that particular constituency. If this is the case the central office is approached. This already has a long list of people who urgently aspire to election. Of these several are suggested to the local association. They are invited before the Nomination Committee or the Executive Committee of the local association. The Secretary of the Association, or its agent, interviews the candidates beforehand, and experience shows that his judgement has much to do with the final choice. The reason for this is clear: the Secretary and the Agent have a vital interest in victory; they are employed (the Agent, in fact, is paid) to obtain victory. They have, as a rule, had actual experience of organizing campaigns, and they are able, better than the Committee, to calculate the chances of success for a candidate. Thus there comes about a certain abdication of judgement on the part of the amateur; and the permanent employee benefits from this abdication. In Germany, one even hears of the 'party bureaucracy'. However, the will of the Committee, if it wishes to exert it against the Secretary or Agent, is final.

What, then, is the composition and state of mind of the Committee? The Committee is no more than about a score of members of the local party association, and this again is nothing but a body of voters, rarely running into thousands, who have formally joined the party, having formally attested their belief in the principles of the party, and who regularly contribute to the party funds. This body formally elects its Executive Committee, and the Executive Committee is the continuously active administrative authority of the party. It is the 'machine' for selecting candidates. Its members are the politically conscious, aspiring, and energetic members of the electorate; they have read a little, attended meetings, and learnt the party jargon.

<sup>1</sup> Cf. for the rule, Labour Party Constitution, 1929, Clause IX. There is no such clause or rule in the Liberal or Conservative Party constitutions, but their practice is sometimes severer than that of the Labour Party. For the Conservative Party, see, e.g., the correspondence between the South Paddington Conservative Association and the Headquarters in 1930, when the Association was excommunicated by Headquarters. The constitutions of the Continental and American parties occasionally contain clauses on this question.

They are capable tacticians, knowing their locality well. Some, perhaps, serve, or have served, as municipal councillors—such office being not seldom the crumbs from the rich man's table to reward them for their services. Upon them falls the decentralized management of a ward in a number of streets preparatory to a campaign.

What considerations determine their choice of candidate? The dominating consideration is victory. It is true to say that a local caucus would rather send an inferior man or woman to Parliament than lose the seat with a superior one. For in Parliament all members are equal, the greatest number controls the law and its administration. However excellent the candidate, if he cannot win he is electorally deficient. Better a seat without a brain than a brain without a seat! The candidate who impresses the Committee as a winner receives the nomination. First, then, the candidate must be loyal to the party. This means not absolute acceptance of every jot and tittle of its creed, but a satisfactory reply to the Committee's questions, which may be, and often are, based (a) on partial ignorance of the party's programme, and (b) on some disagreement therewith. The candidate must in this interrogation 'satisfy' the Committee. He need not do this by a parade of legislative wisdom, by proof of his moral qualities; he must, however, 'persuade' them that either keeping within the bounds of party loyalty, or any deviation therefrom is desirable; and he must persuade them above all that he can win. For the local caucus is fond of a candidate who can add to the party's stock of policy: it persuades them of their independence and their own creativeness: but he must be a winner first. A detailed description of the methods by which one commends himself to others as a successful person is here not necessary: charm, manner, wit, humour, moral incandescence, more substantial qualities like wisdom, knowledge, intelligence, a sincere, if crudely articulate, passion for social justice or for any other ideal. Any of these things and many others may win the Committee's support. Sometimes these things will so affect the Committee that they will miscalculate the speaker's party loyalty and the chance of success. Other things, too, may affect the judgement: gratitude or hope for gifts of money or other property, conviviality in the party's festive meetings, deference to an hereditary title, or large estates, admiration of success in literature, the theatre or philosophy, or respect for long years of work as a trade union official or social worker. This represents the main features of nomination; the essence of which is the collaboration of the local with the central wills.

This is not to omit the activity and effect of Sectional economic and social interests which are an outstanding mark of modern social life. For though the modern state has built upon the notion of Free

and Equal Citizens, it has not yet produced them in all the stark nakedness of the abstraction. The consideration that the peculiar interests of a special group should be represented has some weight in directing the nominations. For example, in coal-mining areas a preference is shown for employers and trade union officials connected with the industry. Here and there in the shipbuilding constituencies a similar thing occurs, so also in agricultural constituencies. This occurs more in England and Germany<sup>1</sup> than in France and the U.S.A., for there, as we shall see later, there are more 'professional' politicians, that is, lawyers, journalists and others, who are prepared to represent any constituency, whatever its chief economic interest.<sup>2</sup> However, as between candidates of the same interest, the main generalizations regarding other kinds of candidates hold good.

This, however, is certain, that few, if any, of the selection committees, in England and France (the U.S.A. and Germany vary only slightly), rationally analyse their own part in political life. If they did they would ask themselves the fundamental question: What are the functions of a parliamentary representative in the modern state? How far ought he to think for himself, and deviate from the party's formally declared policy? What qualities are appropriate to a critic of one's own party; and what qualifications are required to participate productively in committee work, the control of the Civil Service, in discussions on Finance and Foreign Affairs? But to answer these questions, or even to know that they should be asked, requires a sense of public affairs, and a knowledge of public administration, such as exceedingly small numbers of citizens now possess. Because it lacks wisdom and knowledge, the local caucus becomes dependent upon the judgement of a few leading men and women at party headquarters; and even when their judgement is not accepted, they cannot prevent their nominee from coming under the influence and discipline of the central executive of the party once returned to parliament, for he is not likely to be able to do or say much without the aid of the party's information service and handbooks to political questions. Now, since the party must, for its very life's sake, have a minimum number of experts of different kinds, good debaters, able committee men, financial experts, some especially expert in each great branch of social and economic legislation, and in international affairs, headquarters seizes every opportunity that offers to claim a comparatively safe seat for such candidates, and local caucuses rarely dispute such claims. Nowadays, the number of such experts is about one-tenth of all the seats contested by a party. Again, England and Germany are more earnest and rational in this respect, than either France or the U.S.A.

<sup>1</sup> Cf. Kamm, *op. cit.*

<sup>2</sup> In 1929 at least 126 of the British Labour M.P.s were Trade Unionists.

One other thing : some of the candidates selected and returned are members of the central executive authority of the party, and thus are tarred with its brush, although it is true that they have helped to make the composition with which they are coloured.

It is enough, so far, if we have indicated how the idea of party unity and the effects of party organization overcome the atomization of the electorate. We shall observe the operation of other forces in the same direction in a later part of this chapter. But we have described mainly English practice and the generalities regarding other countries. There are national deviations, due to different traditions, needs, and history.

In France, local caucuses play a far larger part in selecting candidates than in England ; for neither the principle nor the organization of nation-wide political parties has been accepted as a necessity. A large number of parties exist and so little possess the organizational qualities usually considered essential thereto, that they are called *Groups*. They have not the continuous history of the political parties of England, Germany and the U.S.A. ; the biggest and strongest are no more than three decades old, and some have an existence precarious within even the lifetime of any single parliament. The Radical and Radical-Socialist Party, the Socialist Party and the Communists have a fairly well-organized system of endorsements (*investiture*), although the localities are more independent than in England.<sup>1</sup> Various associations support candidates in elections without direct affiliation to Groups—e.g. the *La Jeune République*. Then there are weaker political groupings like the *Alliance Démocratique*<sup>2</sup> (which consists of several parliamentary groups) and, in 1919, the *Bloc national*. These receive

<sup>1</sup> The Parti Socialiste (S.F.I.O.) is built up on (1) the communes, (2) the sections (divisions of large towns and collections of communes), which decide upon admissions into the party, groups and sub-sections which must not take action outside the section, and in each *département*, (3) a federation of sections informed (Arts. 4–12, *Règlement en Parti*). The federations engage to respect the principles and programme of the party (Art. 12). *No one may be a candidate for legislative bodies until he has been a member of the party for three years. Candidates must sign an engagement to observe the principles of the party* (Art. 16). They are chosen by the sections of the constituency and ratified by the federation which supervises, for the Party, the observation of the principles (Art. 15). Radical and Radical-Socialist Party (cf. *Statuts* published 17 Rue de Valois, Paris) excludes members or groups with other names, and insists upon its own title. The party is built up on the municipal committees, committees in the cantons, further in the *arrondissements*, and then in a Departmental Federation. The latter is the controlling authority on behalf of the party. The party admits Regional Committees also. *'The Congress is sovereign'* (Art. 10). The regulations regarding elections are not available, but they exist (Art. 18). But the Executive Committee is empowered by Congress to impose the discipline of the party.

<sup>2</sup> It claims to have ninety-nine Deputies and fifty-seven Senators, 'belonging to the principal republican groupings of the Chamber and the Senate, *inscribed on its register*'. It is manifestly in a rudimentary condition of organization (cf. Art. 5, *Statuts de l'Alliance Démocratique*). This party, too, gives 'the investiture of the party' to candidates, through its Directing Committee and its Administrative Com-

some integration of candidates in their ranks, but it is weak. There are then numbers of candidates who fight as quasi-independent or completely independent. The latter are run by local election caucuses, *comités*, which are self-constituted electors, sometimes composed of government officials directed by the *maire* or *prefet* or their close friends. They are free in their choice of candidate—that is, neither law nor custom binds them to the wishes of a constituent body, nor do these oblige them to obey a higher authority speaking in the name of a party.<sup>1</sup> The extent of real party discipline is only imperfectly revealed by tables showing the numbers of ‘integrated’ and independent candidatures.

This is a fundamental defect of French government; its consequences are grave, and so wide that the full import cannot be stated in a few words. Every part of the political machine suffers: Parliament, the Cabinet, the Civil Service, Local Government. These things cannot be discussed until later, but the cause of their deficiencies must be stated and remembered. Unless there is a cohesive force in the electorate there can be no concerted arrangements for the nomination of candidates; unless there are such concerted arrangements there is no cohesive force after the election campaign to hold the representatives together in a permanent and settled frame of mind and behaviour. The initial cohesive force is almost entirely lacking in France except in the Communist, Socialist and Radical-Socialist Parties, where the influence of trade union discipline, passionately held convictions and capable leaders, have produced a sense of party community and loyalty. It is absent because, in the main, the French deny that the unit of government to-day is, or ought to be, the Party. They still cling to the old dogma that the elector is sovereign and separate, and that the unit of political life is first, the voter, and, then, the representative. This is the result partly of character, partly of historical events, and it is impossible to assess the proportions of

mission. Indeed, the *Alliance* expressed, at its Conference of 1930, its repugnance to a policy of party discipline, though not to one of personal leadership by its prominent members. Criticizing the Communists, the Socialists, the Radical-Socialists for taking decisions in party conference assembled, it says: ‘The alliance will not fall into these excesses. It requires discipline, but it does not impose the *perinde ac cadaver*. It is the great party of free men, masters of their opinion and sovereigns of their own thoughts . . .’ (cf. *Congrès National*, p. 28 ff.). Cf. p. 116: ‘From the parliamentary point of view do we offer that solidly organized group, that centre of attraction capable of drawing into its orbit the errant planets? No. We have only a nebulous group policy. From the electoral point of view, what does the *Alliance* offer? Its investiture. That is a certificate of good political life and morals, but that is not always enough.’

<sup>1</sup> Cf. Leyret, *La République et les politiciens*; Benoist, *Les maladies de la démocratie* (Paris, 1929), especially Chaps. I–IV; Servat, *Contre la R.P. intégrale ou tronquée*, p. 23 ff.; Siegfried, *Tableau des Partis Politiques*, Paris, 1930; Jacques, *Les Partis Politiques sous la Troisième République*, Paris, 1913; Servan, *Comment on devient député, sénateur, ministre* (1924); Carrère et Bourgin, *Manuel des partis politiques*, 1924. Cf. also the short biographies of Camille-Pelletan (Revillon) and Briand (Sisco).



each. But it is plain that there is little appreciation of the necessity of government, and, indeed, government has not been kind to the French people. The majority (not all) of French people do not wish to be governed, though they wish to govern; and the consequence is that they are badly governed. For some organization is indispensable, and inevitably develops; but it develops in a hostile world, not in an environment of temperate control. Part of the energy which would otherwise be devoted to service it uses to defend itself; and, having no friends, criticism makes it resentful and malicious. To a foreigner it is amazing, indeed, to observe the blankness of the French political mind in regard to Party. In the literature of political and electoral reform there is much said about the electorate and its incompetence, but Parties enter, if at all, as a minor afterthought, or a lamentable misfortune. Indeed, it is impossible to refer to any French book which specially handles the problem of party organization as the vital part of democratic technique which it is. There are histories of political ideas and struggles, of crises which have thrown up organizations like the radical bloc of 1906-1910, or the *bloc national* of 1919, to meet them, of outstanding men like Gambetta, Waldeck-Rousseau, Combes, Clemenceau and Poincaré, who have embodied and proclaimed a sensational and transient cause. But that is all. This deficiency gnaws at the very vitals of French government, laming its every part. Its basic causes are indicated in a later chapter—they are partly cultural and partly to do with the predominance of the vast small-agricultural and petty bourgeois element in the national economy.

Since the Prussian Constitutional Conflict of 1862-6, strong, but numerous, parties have developed in Germany. The largest parties, the Social Democratic, the German Nationals, the German People's Party, the Centre, and the Democrats, have organizations, central and local 'machines' as thoroughly organized as the English and American, and often the organization goes down to details which are left unregulated by the latter. The parties are strongly centralized<sup>1</sup> and the nomination of candidates is influenced by the central office, even more than in England. Since Germany is a Federal State there

<sup>1</sup> This in spite of the fact that the Statutes of the Parties contain a federal organization, as they do also in France. Statutes, Section 3, of the German Social Democratic Party (1927): 'The foundation of the organization is the District Association . . . the District Association is composed of local associations which may be combined into sub-districts by the District Association. To carry out the work of organization and political agitation the area of the local association can be divided up into agitation groups (districts, sections, wards).' So also Centre Party Statutes (1924), Section 7; Communist Party, Section 11. (This goes down to the original 'cells' in factories, workshops, offices, streets, and then up and up to the Reich Central Committee.) German People's Party Statutes (1926), Sects. 2-5 inclusive.

Somewhat similarly in the British Parties: cf. Constitution of Liberal Party, Constitution of Conservative Party, Labour Party. So also in the U.S.A. Cf. Salt, *op. cit.*, and Kent, *Great Game of Politics*.

is, formally, a separate political life in each of the component states, and this is the expression of certain real differences which still prevail in spite of the unitary movement. State politics require of the political parties two concessions in regard to nomination: they must have regard to the special situation of the party in the state legislature, and secondly, the distinct political features of the country must be 'represented' by the nomination of those who know them at first hand. German political literature is full of the admonition that geography should be regarded in representation. Certain parties, therefore, mainly the parties of the Right, which, more than the Left Parties, insist upon State Rights, are built up out of State party associations, e.g. the German National Party is composed of forty-four State associations, the Centre of nineteen State associations and sixteen Provincial associations, but the rest go mainly by electoral administrative districts, e.g. the People's Party thirty-five Constituency associations, the Democratic Party the same, the Social Democratic Party thirty-three Secretariats, so, too, the Communists. These culminate in Reich Party Conference, Party Committee, and Executive Committee.<sup>1</sup>

Further, the peculiar electoral system, instituted in 1919, Proportional Representation, based on the 'automatic' and 'list' method,<sup>2</sup> operating in thirty-five tremendous constituencies with an average of  $1\frac{1}{2}$  million inhabitants, has had the unforeseen effect of giving the parties more influence upon nominations than they possessed before. Since the electors vote for Party Lists, the order of candidates on each list is vital to the chances of election: and after the fourth name on the list further names need not be given. The central machine feels bound to see that the 'right' men are put in the 'right' places. Further, a special list of candidates called the *Reichslist*, that is the National List, must be drawn up by each party in order to obtain its proportion of the seats to which its surplus votes from the constituencies entitle it, and also, as there are no by-elections, to form a reservoir from which representatives may be chosen when the party loses members of the Reichstag by death or resignation. The list is composed by the party leaders—the 'Bonzes', as they are called—and clearly the order of appearance on the list is essential.

The U.S.A. Now in the countries of which we have spoken, legislative regulation of the selection of candidates is practically negligible. This is not so in the U.S.A. There, owing to the excesses of political parties and groups of self-willed men, nomination has

<sup>1</sup> Cf. Social Democratic Party Statutes, Sections 17 ff.; Centre Party, Sect. 28; German National Party, Sect. 1; People's Party, Sect. 9; Democratic Party, Sect. 9.

<sup>2</sup> That is, one seat is given to each party for every 60,000 votes polled; and fractions are gathered together to form a special National List, which benefits the parties. Voters vote not for candidates but for party lists. Cf. Chap. XX, *infra*.

received close attention and has been submitted, one cannot yet use the word subjected, to statutory regulation.

In the 'twenties and 'thirties of the nineteenth century the modern American party machine was created, its chief elements being a democracy ignorant but strongly conscious of its sovereign power, the monopolization of politics by men who made it a regular 'trade', and the availability of all the paid administrative offices, central and local, as 'spoils' with which the victorious party could reward its supporters. The vast expanse of territory, over thirty-one times the size of England,<sup>1</sup> to be covered by propaganda and drill, if votes were to be turned to account, the theory of the 'rotation of office' which had as its object and consequence a multiplicity of elective offices and elections, made party organization both essential and difficult; but, once established, it was even more difficult for dissentients to overthrow its rule. Oratory, graft, blackmail, deceptive demagoguery, despoliation of public lands and resources welded the parts into an unbreakable machine obedient to the 'boss'. Stupidity, political conceit and recent immigration caused the lower classes to fall into the boss's hands, and the ruthlessness of his invincible tactics, combined with the people's haste after dollars, caused the wealthier and educated classes to abandon political competition. All nominations fell into the hands of professional politicians linked through ward, district, city, county, state, and federation.<sup>2</sup>

This organization had (and still has, though in a much smaller quantity) remarkable commodities for sale. Through municipal government it sold immunity from police interferences, contracts for all public works, leases for tramway, gas, electric light, and water administration; through the state governments, contracts were obtainable, laws were passed for private benefit and others weakly administered, joint-stock companies could obtain charters of incorporation permitting the spoliation of the consumer by monopoly rates and the evasion of civilized restraints in the pay, hours, hygiene and safety of industry and commerce. The Courts of Justice could be 'squared', naturalization could be granted to or withheld from immigrants; from the Federal authority could be filched a share in

	Sq. Miles.
<sup>1</sup> Great Britain and Northern Ireland . . . . .	94,633
United States of America . . . . .	2,973,776
France . . . . .	212,659
Germany . . . . .	180,985
Switzerland . . . . .	15,940

<sup>2</sup> Cf. Godkin, *Unforeseen Tendencies of Democracy*; Gosnell, *Boss Platt and the New York Machine*; Bryce, *American Commonwealth* (earlier Edns.); Ostrogorski, *Democracy and the Organisation of American Political Parties*, I; and more recent studies—R. C. Brooks, *Political Parties and Electoral Problems*, 1923; Sait, *American Parties and Elections*, New York, 1927.

the 'pork barrel', that is, the mass of annual expenditure upon internal improvements: laxity of customs and tax administration, and the postponement of legislation needed in the public interest was obtainable. Moreover, hundreds of thousands of paid offices, legislative and administrative, were obtainable by the electoral voters.

A famous American cartoon depicts some birds of prey upon a mountain crag. Anxiously they scan the Heavens, full of the thunder, lightning, and rain of Justice. By their talons are the picked bones of the Treasury, Justice, and the Suffrage. The legend runs, 'Let us Prey!' This injunction was executed largely by the sale of nominations of candidates for the benefit of private interests. In a democratic system, however, some show of public consultation is indispensable to the permanent reign of the 'boss'; and, indeed, nominating committees of party delegates called *primaries* had a history going back to the Heroic Period of American History.

The Primary is simply another name for local caucus, or local association of party members, the basic or original cell of party members who meet to designate candidates for the smaller authorities, and delegates to the higher, or secondary, conventions, which select the candidates for the higher political offices. They are, therefore, vital parts of the democratic system; and until recent years, they were thoroughly corrupt. The local politicians arranged primary meetings in such a way that their will destroyed the public's. The arrangements produced an expressive terminology. The 'slate' was made up privately by the 'bosses', good citizens being sometimes included in it. The party membership-roll, inclusion in which gave the right to vote at the primary, was either falsified to exclude opponents of the slate-makers, or 'padded' with false names. 'Repeaters' voted several times, while the primary scrutineers or inspectors appointed by the henchmen of the 'bosses' could not, curiously, detect impersonation. Date, time and place of the meetings were arranged as inconveniently as possible for dissentient elements. The places chosen were sinister saloons in shady neighbourhoods; and they were 'packed' with rowdies, sometimes lent by the organization of the rival party on the principle of 'live and let live'. The procedure was 'cut and dried', the chairman with his henchman tolerating no nonsense. Ballot-boxes were 'stuffed' with fraudulent votes, or more direct ways were taken with the count. 'Snap' primaries were held, that is, meetings were fixed and held suddenly, without due notice; or sometimes the chairman's watch, being unaccountably fast, the meeting was held and over before the innocent voters arrived.

This system exploited the power of the general will and destroyed its judgement.

About 1870 America began to awake to a consciousness of its political degradation.<sup>1</sup>

A stimulus was given to political reform.

'Having defined the people so as to include women as well as men, the Progressive Movement aims to give to a majority of the people so defined an easy, direct, and certain control over their government. The first of the measures proposed by the Progressive Movement to give to the people greater control over the nomination and election of candidates is a direct primary law. It has long been the boast of politicians that they do not care who elect candidates to office so long as they have the power to nominate them.'<sup>2</sup>

Direct Primary Laws were passed in most states.<sup>3</sup>

Practice varies rather widely from state to state, but the general intention is to take the powers of nomination away from the party managers and give it to the people, as directly as possible. This involves the establishment of a special meeting at which the nomination shall take place, and, further, the regulation of its procedure.<sup>4</sup>

<sup>1</sup> The exposure of the 'Tweed Ring' in New York in 1871, after years of legal proceedings, attracted the national attention to the daily iniquities of the 'bosses' and the 'rings'; and close upon this revelation followed the Credit Mobilier scandal, in which the Vice-President of the U.S.A. and several members of Congress were implicated; then followed other sensational discoveries in the field of corrupt administration. A reform movement commenced, led by men like Carl Schurz, George W. Curtis, editor of *Harper's Weekly*, E. H. Godkin, editor of the *New York Nation*, and Dorman B. Eaton: all were interested in cleaner politics, civil service efficiency, and economical government, and the reputation of democratic government. Almost simultaneously women began to enter the field of politics, establishing special organizations (the National Women's Suffrage Association and the American Woman Suffrage Association) to obtain female franchise, and their civic clubs began to exert an important influence upon politics, especially with the steady development of woman suffrage. Then, sated, perhaps with the firstfruits of greed in a new and abundant land, the people were moved by a large circle of reformers—the 'muckrakers' of 1895–1908. Tarbell's *History of the Standard Oil Company*, Lawson's *Frenzied Finance*, Upton Sinclair's *The Jungle*, Stannard Baker's *The Railroads on Trial*, David Graham Phillips's *The Treason of the Senate*, Lincoln Steffen's *The Shame of the Cities* and *Enemies of the Republic*, turned such fierce lights upon the corrupt places of American life, and did this in such widely read magazines, serially (which has a cumulative and mass effect), that a new electoral morality was engendered. The evangel was preached by the great prophet of reform, Theodore Roosevelt. He, who invented the word Muckraker, was the artist in agitation and tactics needed to transform facts and opinions into the dynamic energy of the masses. Intensely convinced of his cause, an excellent orator, physically vigorous and pleasing, able to travel long distances and to speak interestingly, past-master of tactics and a coiner of pungent phrases, with an expansive geniality attractive of friends, and the moral and physical courage which does not shrink battle, he was at once a popular 'revivalist' and a well-qualified rebel against the bad old men of the Republican Party. Cf. *Nelson W. Aldrich*, by Nathaniel Stephenson, 1930, *passim*. Cf. Bigelow, *The Life of Samuel J. Tilden*, 2 vols., New York, 1895; J. F. Rhodes, *History of the United States*, VII, New York, 1906.

<sup>2</sup> De Witt, *The Progressive Movement*, pp. 196, 197.

<sup>3</sup> In the first years of the movement laws were passed by Pennsylvania (Lancaster county), 1871, Nevada, 1883, Colorado, 1887, Iowa, 1898. The three latter Acts were mandatory. For further details see Sait, *op. cit.*, p. 275.

<sup>4</sup> 'Essentially the direct primary system is a system for making nominations by popular elections—the Primary held under state management. When applied to all offices it abolishes not only the state convention, but lesser conventions in

The problems inherent in this system are obvious upon reflection. They are these: (1) Who has the right to attend and vote? This involves the definition of a Political Party and the test of membership of a Party—assuming, as American theory and practice assume, that the Primaries are to be based upon the recognized existence of political parties. Is the Primary to be ‘open’ to any voter, or ‘closed’ to all but the communicants of the Party officially in charge of the Primary? (2) How is a candidate for nomination brought to the attention of the Primary—how is he ‘designated’, as the jargon goes? (3) What majorities are required for an effective choice of candidate?

(1) Parties are legally defined by the strength shown at previous elections, a minimum being laid down in terms of votes or percentage of the poll.<sup>1</sup> The New York definition of a party is, a political organization which polled at least 25,000 votes for Governor at the last preceding election; in Texas it is 100,000. This number is so small compared with that usually polled, that it is not unfair to the aspirations of new and rising bodies of opinion. The percentage tests are sometimes severer; in Maine and Wisconsin 10 per cent. of the total vote is required, in Illinois and Pennsylvania 2 per cent., in Massachusetts and California 3 per cent., in Idaho and Tennessee and ten other states 10 per cent. But the large percentages of 20 per cent. and 25 per cent. are required in Kentucky and Alabama, and Virginia respectively (and 30 per cent. in Florida), the explanation here being that a large reduction of this minimum would involve the danger of specifically Negro Parties. Some states, in order not to block the path to political expression, provide that recognition as a party may be obtained upon a petition signed by a certain number of voters, as, for example, in California, Oregon and Idaho which require respectively 3, 5 and 10 per cent. of the voters to petition, and North Carolina which requires 10,000 voters.<sup>2</sup>

Now parties thus defined are obliged to obey the law regulating the procedure of the primary. Minority parties are not thereby excluded from the general elections, but nominate by petition, their nomination appearing on the ballot papers in those elections.

The definition of parties in these terms is not wanting in exactness. This cannot be said of the definitions of membership of a party. When a test is imposed by law the primary is said to be ‘closed’; when no test is established the primary is ‘open’. Twelve states

districts, counties and cities, and popular caucuses or primaries as well. The convention system was a representative and indirect method of making nominations; the direct-primary election system is direct in that it places the nominating power in the hands of the voters themselves.—Brooks, *Political Parties and Electoral Problems*, pp. 242, 243.

<sup>1</sup> Details in Sait, *American Parties and Elections*, pp. 390, 391.

<sup>2</sup> Brooks, *op. cit.*, p. 245.

have experienced the open primary, but only three still continue it. In these three states the voter is given the ballot papers of all parties together, secretly marks and returns them so folded that his choice remains undetected. With this system—the open system—the party affiliation of the voter is not revealed : undue influence is thus avoided, which might subject the voter to concentrated electioneering by canvassers or even to obstruct his change from one party to another as his opinion changes. The open primary, however, has the serious defect that it is dissolvent of party : for members of other parties may press into the primary of the dominant party, and interfere with its domestic politics, sometimes with the intention, even, of causing the election of the weaker candidate, while the Managers within their own primary use the votes of people not strictly their own, to determine the issues in their own camp. This state of affairs has been revealed in Wisconsin and Michigan.<sup>1</sup> The ‘open’ primary has tended, therefore, to give way to the closed.<sup>2</sup>

The tests imposed in the ‘closed’ primary system consist of declarations : these may be made either before, or at, the primary. Those made before the primary are classified under the ‘enrolment system’ ; those made at the primary under the ‘challenge system’. Nineteen states operate under the former, and the voter makes a declaration of one of two kinds : (a) as to past allegiance and (b) as to present affiliation and intentions. The latter are much more frequent than the former. A good example of the latter is the Californian law which states<sup>3</sup> :

‘At the time of registration each elector shall declare the name of the political party with which he intends to affiliate at the ensuing primary election or elections, and the name of such political party shall be stated in the affidavit of registration and the index thereto. If the elector declines to state the fact, the fact of such declaration shall likewise be stated, and no person shall be entitled to vote the ticket of any political party at any primary by virtue of such registration, unless he has stated the name of the political party with which he intends to affiliate.’

In New York the voter declares his general sympathy with the principles of the party and his intention to give its candidates general support in the next election. In some states enrolment takes place at the primary.

May a voter, having enrolled, change party ? Provision is made for this in most states ; and it consists essentially in personal or written application to the registrars within a minimum time before the primary elections. In other states a change of affiliation is allowed only during the normal registration period. In Iowa and Wyoming

<sup>1</sup> Sait, *op. cit.*, p. 401.

<sup>2</sup> Cf. McClintock, *Party Affiliation Test in Direct Primary Election Laws*, *Am. Pol. Sc. Rev.*, Aug., 1922, pp. 465–7.

<sup>3</sup> Section 1096, *Political Code*. Cited by Sait, *op. cit.*, p. 403.

a change may be made actually at the primary, upon oath that the change is made in good faith.

Voters so enrolled may, in several states, be challenged at the primary to give proof of having previously voted for the party. Such challenge, however, is politically dangerous since it may drive the voter to support the opposition party at the General Election.<sup>1</sup>

In the 'challenge' system which is prevalent in some fifteen states, the voter swears at the primary that he did not vote in the primary of another party for a period of so many years, e.g. two in Illinois; or, positively, that he voted for the party in the last election as in Kentucky, Ohio and Virginia; or, prophetically, that he will vote for the party at the next election, as in Nebraska, Missouri and other states. We discuss the effectiveness of these arrangements later.

(2) In the South and West a large number of states permit candidacy by a simple declaration and the payment of a fee. In others a petition is required, supported by a stated number or percentage of the *party* votes,<sup>2</sup> as, for example, five voters in Ohio, 300 in Colorado and one, two and three per cent. in Maine, Oregon and New York respectively. These qualifications must sometimes be accompanied by the payment of a fee. Further, the supporting voters are often required to belong, so many or such and such a percentage, to well-dispersed local government areas in the constituency. Some states, finding the primary elections difficult to run without previous concert among the party leaders and officials, arrange for 'pre-primary designating conventions'. Here in the assemblies elected under rules determined by the respective parties, the delegates vote for the candidates: a certain quota of votes, for example, 10 per cent., entitling each candidate thus endowed to appear as a candidate in the primary. In South Dakota a state law regulates the calling and activities of such assemblies.

(3) The primary elections for candidates are apt to suffer the same conspicuous difficulty as ordinary elections, namely, that if the ordinary rule of relative majority prevails, and where there are more than two candidates for one place, a minority of votes may triumph. Remedies have been devised. In some states the Alternative Vote system is accepted in order that the candidate chosen shall ultimately achieve an absolute majority. Iowa has a plan which requires that when no candidate obtained more than 35 per cent. of the total vote, the primary is dispensed with, a state convention taking its place. Other states, having a specific percentage system, abandoned it for the relative majority, since experience showed that while crucial issues resulted in a two-sided contest, only personal issues caused a

<sup>1</sup> Brooks, *op. cit.*, p. 250.

<sup>2</sup> They vary with the importance of the office sought in each case.



many-sided contest which did not concern the public so much that a minority victory needed to be prevented by special legislation.<sup>1</sup> Other states have adopted the second ballot system, or as it is technically called, the 'double primary': a second ballot taking place between the two top candidates when no absolute majority is obtained at the first ballot.

By these methods American legislators have sought to break the power of the 'party managers', and to give back to the people the power of choosing their representatives. Have the methods succeeded, and if so, to what extent?

What has been the effect upon the Party Machine? It has been weakened, but not very much. For its organizing and campaigning services are almost indispensable to success in primary candidature and in the subsequent elections.<sup>2</sup> The candidate for nomination is not now so completely dependent upon the party managers for selection as before. He needs the support of the voters at the primary, and if he can obtain support he can dispense with the benediction of the bosses. He is then involved in two duties: he must induce people to attend the primary, and to vote for him. That is, the procedure to win a seat at a general election must be followed in order to win a candidature, not always in so intense a manner, for the battle is within the party fold, and not against an external opposition. But human nature does not, because it cannot, so easily solve its problems. Even as at a general election candidates seek anxiously for 'wire-pullers', for those with more than the ordinary influence; and even as they negotiate with interests and groups, so at a primary campaign, they tend to gravitate to the party managers or become the satellite of some more powerful man who himself seeks higher office.

Further, where there are acute personal differences within a party, which may happen anywhere in the Union, or where there are real political differences about state politics, as in parts of the South, and the North and West, *or where one party is so fast in the saddle* (as in the South where the Democratic Party has an almost exclusive hold upon office) *that nomination is equivalent to election to office*, the primaries become the field of intense electioneering. Hence an amount of mendacious and spiteful publicity about the candidates which is rare in European countries, except when rival members of the same

<sup>1</sup> C. E. Merriam, *The American Party System*, New York, 1922, p. 268: 'In some places experiments have been made with the preferential voting system, as in Wisconsin, North Dakota, Idaho and other instances. Difficulty has been found in persuading the voters to make use of the preferential vote, and not all the predictions of the promoters of the new plan have been realized. But unquestionably this plan increases the power of the individual voter, and broadens the range of his possibilities, and it will probably be more widely used in the future than at present, with the development of the various types of the preferential system generally.'

<sup>2</sup> Kent, *The Great Game of Politics*, New York, 1926, Chap. XXXV.

party fight each other, as in the East Islington and St. George's elections in England, 1931, when the Conservative Party was torn by dissension. Thus the public is treated as the arbiter, and is canvassed more sedulously, on the whole, than under the previous system.<sup>1</sup> The party managers are still important in this process, but, obviously, votes in a properly regulated primary campaign cannot be 'traded' quite as easily as before.

Emancipation from the absolute control of the 'boss' has made candidature easier than before, and the number of candidatures has increased. This, with the public's realization of its authority, has stimulated interest in 'primary' politics, but that interest is not uniform for all offices. It is greatest where the offices are most important, namely, in the chief legislative and gubernatorial offices, but in the minor executive and judicial, it is apt to be small. Here the party managers are still potent: they make and 'put over' the 'slate' as of old. They are primary to the Primary. The public interest is, further, most intense where the party's prospects of success at the General Election are greatest, with the result that, there, a difference of political or personal opinion makes the work and rule of the managers difficult, while where interest and opinion are quiescent, the managers pull the strings.

The primary elections have affected the normal functions of party by shaking its foundations—hierarchy and discipline. This has come about in three ways. Firstly, it has become less easy to distribute nominations among the orthodox and heterodox groups in the party. Just as in France and Germany political parties can be induced to 'concentrate' in a Ministry by the gift of a number of portfolios, so in the U.S.A. it was formerly possible to keep the party together by dividing out the offices of the state among the various sub-groups. The primary system enables the triumphant majority to behave despotically. Secondly, differences which were formerly settled in private can now be ventilated and settled in public. Any dissentient element need not obey the majority or concede part of its claims, for the sake of unity, since it is licensed to fight for its own candidate, with its own policy, in public. Nothing is so bitter as civil war, especially among professional warriors: nothing so difficult to quieten as its aftermath. That has been taught in England by the private and public conflicts of Lloyd George and his opponents in the Liberal Party since 1924, and in Germany by the feuds between the Majority Socialists and Independent Socialists between 1918 and 1921. Imagine such conflicts made permanent and *public*! American observers emphasize the disintegrating effect upon party counsels, and the loss to parliamentary institutions, and to the public itself, which is asked to judge differences of opinion which it cannot really judge, since they are too

<sup>1</sup> Senator Pepper, *In the Senate*, Chaps. I, IV and X.

many and often personal.<sup>1</sup> Finally, the 'committee-men', that is, party officials and workers, are chosen at the primaries also. Formerly such members of the hierarchy, particularly those at the top, were self-chosen, and got themselves elected or ratified by the conventions, which were manageable. At any rate they had about them an air of authority—that is the presumption of rulership with a title from an elevated source. They had a prerogative derived not really, although ostensibly, from election. Their title may have been morally bad, and its destined uses corrupt. It had, however, the quality of reducing the lower members of the hierarchy to obedience, and, therefore, of making and keeping the party one and indivisible. All the ranks of committee-men and candidates now come from the same source: election by the Sovereign People. This would, in any case, cause a weakening of cohesion and responsiveness throughout the body of the party: but there is the defect also that committee-men are sometimes elected before the candidates for whom they are to manage the election campaign, and since the party may be fluid in policy and membership, dissensions may and do arise.<sup>2</sup>

It is not easy to say how far party disintegration has been caused by the Direct Primary. In the first place, quantitative measurement being impossible, observers differ widely in their estimation. Secondly, opinions differ not according to what is actually observed, but according to the observers' ideals, some desiring to discredit the primary because they believe that it threatens a well-integrated bi-party system without which representative government breaks down, and others to applaud it because they believe that, even with it, party managers will pursue, as in the past they have pursued, infernal plots against the people.

The truth seems to be that party organization has been endangered, that it has even suffered, but that the party managers have been able to adapt themselves to the requirements of the primaries singularly well.<sup>3</sup> They prepare their 'slates' as before; they pull the strings as before, with a little more difficulty, and, to compensate for this, with more ingenuity; and though their power is decreased by the threat of a potential revolt against them, it has been increased by the addition of one more set of elections to the already great number upon which the professional politician must instruct the public. The system forces political leadership to come out into the open of the primary, but the vital need of instructing the masses and of thinking and concerting before instructing, still throws leadership into the hands of the 'invisible government'. And how ignorant the public is is proven by the primary laws which, to avoid the advantage obtainable by

<sup>1</sup> E.g. Croly, *Progressive Democracy*, 1913, p. 344; Holcombe, *State Government in the United States*, New York, 1920, p. 193; Brooks, op. cit., p. 259; Sait, op. cit., pp. 424, 425.

<sup>2</sup> Holcombe, op. cit., p. 194.

<sup>3</sup> Kent, op. cit.

candidates with names first in the alphabet, provide for an order determined by rotation,<sup>1</sup> or priority of petition, or by lot.<sup>2</sup>

The tests of party affiliation have proved to be the least satisfactory part of the primary system. Where the test is strict and elaborate, as in the South, no more has been accomplished than to cause the voter to reiterate current party jargon which he is apt to learn direct from the lips of the inquisitor, whose interrogation is lax for fear of driving away votes. The real purposes of the voters who take the test are beyond the scrutiny of the inspectors. It is said that the voters are impelled to register and some to participate in the primaries, because they like the thought of having one more vote. Voting figures show quite clearly that primaries are invaded, and that voters register for one party and then vote for another. It is clear that a party test is only practicable under the following conditions: (a) if the parties are sundered by clear and definite programmes of which the voters are entirely ignorant, but which, having blindly accepted, they will maintain at the ensuing election, or (b) that the parties have clear and definite policies separating them, that they are sincere in wanting only the convinced voters on their register, and that the voters are so convinced by the programme, which they fully understand, that they could neither enter the primary of another party, nor vote for any but their own candidates at an election. Neither of these prerequisites exists: the voters are neither blind, nor fully enlightened; the parties are neither certain of their own policies, nor scrupulous in gathering votes. All are somewhere between, and consequently the party label may mean something, but it does not mean much for long.

It is impossible that the primary election should take place without a preliminary campaign which may be conducted in the open or in the dark. Open campaigns are necessarily conducted when the petitions are being pushed; and this process has raised two problems, that of fraud and force in the collection of signatures, and the public regulation of 'publicity' and its cost. Fraud occurs in the forging of signatures, and force in pressure and non-rational persuasion. Apart from the costs to the state, which are considerable,<sup>3</sup> the candidates' burden is exceedingly heavy. About £40,000 was spent on behalf of one candidate for the Senate in 1918.<sup>4</sup> Although some states forbid party

<sup>1</sup> E.g. The Ohio Law says that the first series of ballot papers is to be printed in alphabetical order; 'then the first name shall be placed last on the next series printed and so shall the process be repeated until each name shall have been first. The ballots shall then be combined in tablets by selecting out from each series of ballot in regular order and so repeating, so that no two of the same order of names shall be together, except when there is but one candidate for any said nominations.'—Sait, *op. cit.*, p. 398.

<sup>2</sup> Beard, *American Government and Politics*, p. 548.

<sup>3</sup> Sait, *op. cit.*, p. 421 et seq., and Brooks, *op. cit.*, p. 260 et seq.

<sup>4</sup> Sait, *loc. cit.*: Other expenditures for the same office at different times are £20,000, £7,000, £10,000 and £30,000. Cf. also *Campaign Funds*, Senate Report 603, 2 pts., 70th Congress, 1st session (1928).

expenditure upon primary campaigns and others strictly limit the expenditure, in fact the rules are evaded, and the advantage is easily with those who have money to spend on publicity, or who are supported by generous parties or groups. The very process of appealing to the people inevitably returns the powers to the place whence it was to be revoked : to the party, which possesses the instruments of publicity, the workers and the money.<sup>1</sup> In the pursuit of equality Oregon has arranged for the state publication and distribution of a Publicity Pamphlet for primary purposes. There is a Pamphlet for each party, and each candidate may therein publish his portrait and reasons why he should be nominated. Any person or persons may file an opposing statement. A flat rate is charged for one page each to candidate and opponents ; for highest state offices the charge is 100 dollars per page. No more than a maximum of four pages can be bought. It is said that the scheme 'seems to have given satisfaction'.<sup>2</sup>

The instinct for pre-primary control of the primaries cannot be smothered ; and we have seen that some states have set up pre-primary conventions in order to give parties the opportunity of consultation and concerted arrangements. This is an inevitable development, whether the law recognizes it or not, for in a democracy nothing is to be done without a majority, and majorities do not come ready-made. The existing parties, those with a history, do, in fact, privately conspire to help candidates and so let the public know whom they have chosen. Merriam says :

'The pre-primary slate has appeared more frequently than was anticipated either by advocates or the opponents of the new primary plan. The possibility of this was pointed out by some students of the subject, but it was not generally realized that the organization or the machine might name the candidates in advance and then obtain the ratification of the slate proposed by them. In some cases this possibility has become a fact and a custom. In such cases the primary has ceased to function as intended by its proponents. In many other instances there have been no slates at all, or if framed they have not obtained a uniform or even an encouraging success. . . . The direct primary has not made automatically impossible the control of the nominating system by a ring or machine, even of the corrupt type.'<sup>3</sup>

The inward knowledge that parties are indispensable has caused the suggestion of a new pre-primary system to be made by Charles Evans Hughes, formerly Secretary of State of the U.S.A., and now Chief Justice of the Supreme Court of the U.S.A. He proposed <sup>4</sup> that

<sup>1</sup> Cf. Kales, *Unpopular Government in the United States* (1914), p. 117: 'It is that (the burden of political duties) which makes him politically ignorant and forces him to fall back upon the assistance of the professional political adviser. When the primaries double the burden on the voter they increase twofold the necessity for permanent organizations for directing and advising the politically ignorant voter how to vote. Consequently, so far from disrupting an extra-legal government, the universal and compulsory primary makes its continued existence even more certain.'

<sup>2</sup> *Sait*, op. cit., p. 423.

<sup>3</sup> *Op. cit.*, p. 214.

<sup>4</sup> 'The Fate of the Direct Primary', *National Municipal Review*, X (1921), 23-31.

the party committees should recommend candidates for nomination ; and that, consequently, the only contests at the primaries would be those where the rank and file were positively dissatisfied with the party's choice, or where a minority had good cause to want a contest. Hughes's motives were that a double campaign, both the pre-primary and primary, would be avoided ; that the discussion of the merits of opposed candidates is better conducted in private than in public, and that the bitterness of public strife over such matters may thus be avoided. It is argued, too, that such a plan ' would regularize what is now the practice of an irresponsible organization in many states and permit a drafting of candidates in the states where now everything is left to the self-advertisers '.<sup>1</sup>

What is it that causes this flight from the party to the primary, from the primary to the pre-primary, and from this, maybe, to the pre-pre-primary ? It is the belief that somewhere there is the pristine voter, pure and undefiled, who, if properly informed, will vote as an ideal man for ideal parties and policies, without organization. It is the flight from men to Man, from Americans to Adam before the Fall. Since Man does not exist, the Party still contrives to take his place.

Some other considerations. The numbers attending at the primaries are small. In Indiana some 50 per cent. of those voting in general elections (already fewer than one-half of the electorate) attend the primaries : in New York the vote has ranged between 34 per cent. and 20 per cent. of those voting in elections.<sup>2</sup> But greater percentages poll where the contests are exciting. These numbers seem small : but the number of people participating in a choice of candidate, with the effective opportunity of choice, is far greater than the number who concern themselves even to this extent (which, at the minimum, is to ratify the choice of the party) with the selection of candidates in England, France, Germany and other countries where nomination is unrestricted by law. This cannot but have a rousing effect upon the voters, if we admit at all that experience is capable of teaching.

Some difficulty arises, however, with regard to the ' platform ' or compendium of policies which the party puts before the electors. If a convention of a party frames a platform it is not sure whether any of the adherents to that platform will be elected ; if several candidates for nomination put up, are they to suggest their own policies ? But for the voters this means woeful confusion if the policies are set out at length. Therefore short, compendious pronouncements have been proposed, and, in one case, actually adopted. Among those proposed in legislative form are those of Texas and Washington in 1919. According to the first, no demand for specific legislation could be embodied in the platform of a party unless it should have received a majority vote

<sup>1</sup> Boots, ' *The Trend of the Direct Primary Legislation* ', *Am. Pol. Sc. Rev.*, XVI, 431.

<sup>2</sup> All in *Annals of American Academy*, 172, 171, 139-40.

at the primary after being submitted at the petition of 10 per cent. of the party voters. In Washington, it was proposed that if a candidate for nomination had advocated a proposition for three years it might be put upon the ballot. If, altogether, more than twenty-one propositions appeared, they were to be reduced to that number. Further propositions could be put by a hundred petitioners and if accepted at the primary 'it became the paramount duty of the legislature . . . to enact them into a proper and consistent form of law'.<sup>1</sup> In South Dakota<sup>2</sup> the paramount issue of majority and minority groups appears on the primary voting papers in *eight words*; while in Oregon a very generous law has provided that each candidate may express himself in twelve.

To an English observer nothing in politics can appear so quaint and dangerous to truly effective, as distinct from apparent, representation, as the choice of candidates with little or no continuous guarantee of a policy. In a large number of states, party conventions, voluntarily or by law, establish a platform—some before, some after the primary; but there is not that contact between candidates and policy which comes by their previous identification and selection on its basis. In other states, councils of candidates and sitting members formulate the policy. This is better than the convention system as a means of bringing the policies, the candidates, and later judgement upon their work, into close correspondence. But the more an automatic legal separation is effected between candidate and policy, the more must party be relied upon to make them combine.

Finally, has the Direct Primary System caused the choice of 'better' or 'superior' candidates? American observers speak with an uncertain voice in answer to this question. One says that it is impossible to prove that it has produced a superior type 'in the absence of accepted standards of measurement to determine political ability and virtue'.<sup>3</sup> The utmost he concedes to the primary is, that 'given a popular revolt against the machine of sufficient magnitude it is possible to break the slate of the latter'. He gives one example of this, and concludes: 'No doubt the possibility of such untoward events induces a certain moderation on the part of political bosses that is doubtless salutary. On the whole this seems to be the greatest single advantage that can be claimed for direct primary elections after twenty years' experience with them.' Another says: 'Yet no judicious and impartial observer will contend that the new nominating system has revolutionized the character of candidates with reference to their ability, their integrity or their representative character. This is a part of the great problem of democracy, which cannot be so simply solved, and which will not

<sup>1</sup> Boots, 'Party Platforms in State Politics', *Annals*, p. 73.

<sup>2</sup> Berdahl, 'Operation of the Richards Primary', *Annals*, pp. 168-71.

<sup>3</sup> Brooks, *op. cit.*, p. 257.

be determined either by directness or indirectness in methods of selection.' <sup>1</sup> A third says: 'But there has already been no advance in the quality of public offices since the abandonment of the nominating convention.'<sup>2</sup> Holcombe concludes that 'Doubtless some men have been nominated who would not have been nominated under the former system, or at least would not have been nominated so easily, but it cannot yet be affirmed that the type of man who is successful in politics has been materially altered'.<sup>3</sup>

**Implications of Experience of the American Primary.** What does American experience teach? It is perfectly clear that the fundamental factor in the choice of candidates is the good sense of the electorate; and if the electorate is ignorant or stupid or malevolent it cannot better what little groups of men choose for it. Indeed, such groups tend to maintain a respectable level in order to perpetuate their own importance, for no authority is so certain that it may not be challenged, if not overthrown. Parties are in this respect like bureaucracies: in order to choose their favourites they prefer to be patrons, not accountable to others; but, once the principle of answerability is admitted, and their power is exercised upon sufferance, they strive always to behave so as not to shock the public. Further, in the party, there is always the risk that outsiders and insurgents will challenge a monopoly of power malevolently used. In America this was already happening when the Primary movement took effect. Some people were turning from pursuit of wealth or individual or family happiness in other ways, to the gratification of a sense of public duty. Their intervention put the 'bosses' on their mettle, and revealed their scandalous tricks. There is no doubt that without the direct primary system the parties would have been purified by the mere change in political morality which came to pervade large masses of citizens, and to be expressed by various civic organizations. Yet the parties still exist as the managers of the primaries and the general elections. Naturally: for experience everywhere shows that only a very small percentage of the independent and sovereign voters are really equal—to the task of making a choice. They do not know the nature of the office, or the character and attainments of the men, and they cannot know without long years of study and personal contact. Without an agent who knows these things they are helpless. The agent is any organization, which proclaims itself capable, and can persuade the electors that it is capable. The agent which commands is that which has a long history, which secured the loyalty of the parents and grandparents of the contemporary electorate—it is the agency we call Party.

Can it be expected that the people who allow the parties to live

<sup>1</sup> Merriam, *The American Party System*, p. 256.

<sup>2</sup> *Sait*, op. cit., p. 420.

<sup>3</sup> *Op. cit.*, p. 196



shall not allow their nominees to survive? Can it be expected that the people who follow party direction at general elections shall at the primaries appoint candidates better than the parties have at their disposal? No! They will choose much the same kind of candidate as the party chooses when acting freely. The party desires the candidate who (1) can win, (2) accepts the party policy, national, local and personal, (3) can subscribe towards its electoral and social expenditure. The voter wants the candidate who can win; and the party, in choosing him, would have gone by very much the same signs as the voter, for its candidate is designed to capture the voter—the principle of the party in this choice is popularity: and this is what also affects the voter. The divergence between party and voter comes from the knowledge possessed by the party, with its centralization of facts, which candidate is willing to satisfy the greatest number of local voters who differ in opinion on some questions, who can be united by the proper combination of qualities in a candidate. If there is virtue in union among the electorate in the choice of a representative, then the caucus method is to be preferred to direct choice, unless direct choice is more than a farce or a rare safeguard to small but growing minorities. In regard to the assent to party policy it needs no special stretch of the imagination to realize the incapacity of the individual voter to elaborate a *national* policy, or even to-day, a municipal policy. It is equally impossible to imagine this accomplished by an uninstructed and unconcerted mass movement. It is obvious that it can only be done by a small semi-professional body. But it is true that *having acquired power, owing to the technical need for their services, parties may use it tyrannically for their personal benefit, or negligently from a public standpoint.* Then the primary system might offer the prospects of release through the efforts of bands of reformers appealing directly to the people against the 'old gang'. In England, in Germany, even in France, this has rarely been a great evil since midway through the nineteenth century, because a public standard of honour, and the cashiering of the unworthy, at general elections, has kept the caucuses, local and central, fairly wholesome. Corruption in the U.S.A. would, without doubt, have been banished during the last generation because of the intervention in politics of a class which has a high standard of public honour. In proportion as this class has not intervened the primary still harbours the corrupt and anti-social intentions of the 'bosses'.

The freedom of the electors to be articulate certainly opens the possibility of complete representation; but informed representation, and controlled representatives, are possible only if articulation flows through the coherent and permanent channels of party organization. Wherever those channels are fairly straight, and the access is not corruptly obstructed, the caucus can be left untouched by law; wher-

ever they are crooked or stagnant such rules as those of the Direct Primaries can occasionally, but no more, compel their amendment. America, the land of gigantic vices, has necessarily become the land of heroic remedies.

**The Number of Elections.** It is perfectly clear that if all these issues are involved in a single nomination, they must, *a fortiori*, be the more troublesome where there are many elective offices, and where many nominations are required. Indeed, it is very easy to put an intolerable burden upon the elector. The frequency with which he is called upon to vote is therefore a serious democratic problem : for, if the voter is given a difficult task, the 'bosses' and the parties step in to help him, and he must pay their price. This holds good, not only of nominations, but also in general elections. In England, the maximum number of elections in which a voter participates *in a year in which all electoral periods coincide* is four—Parliamentary, county, rural district (or urban district or municipal borough) and parish ; and the total number of candidates is not more than a score, since only legislative officers are voted for. (In County Boroughs, parish and district drop out.) In France and Germany the arrangement is much the same. Further, the elections are separate. In the U.S.A., however, there are Federal, State, County, City and Judicial Officers to be elected, and initiative and referendum proposals to be decided at the same time.<sup>1</sup> 'An examination of the ballots used in fourteen presidential elections of 1924 shows that over 50 per cent. of them contained *twenty or more offices to be voted for*, to say nothing of the propositions also presented'.<sup>2</sup>

It is clear that the 'machine' is given a marvellous opportunity, and that voters are discouraged from voting, a question to which we address ourselves in Chapter XIX.

<sup>1</sup> Cf. Gosnell, *Why Europe Votes* (1930), p. 209. Ballots have frequently reached phenomenal proportions ; e.g. Illinois, 1920—33 by 25 inches ; New Jersey and Pennsylvania, 1920—25 by 21 inches. This unwieldiness has even produced mechanical voting devices.

<sup>2</sup> The number of offices is exemplified in the ballot of Portland, Oregon, in November, 1920 : Ninety-one candidates running for fifty-two offices—national, state, county and municipal. Cf. Brooks, *op. cit.*, p. 427.

## CHAPTER XIII

### PUBLIC OPINION AND THE PARTIES

**T**HUS the vast body of electors are not in fact free and equal. They do not spontaneously move in an undifferentiated and incoherent mass. They are marshalled, and their candidates chosen for them, by those who have seized the power. Only in a very limited sense can it be said that the people choose their representatives.

Nor are the voters left to their own devices once candidates have been nominated. For the aim of a group or a party is to send its nominees to the representative assembly or the executive offices which are open to election. Therefore a continuous process of 'education' is undertaken by the parties; it increases in intensity in the few months preceding an election, and becomes furious in the final fortnight.

Before the activity of the parties is analysed it is essential to consider the qualities without which sound representation is impossible, and to ask how far the electorate possesses them.

**The Quality of the Electorate.** Three qualities are indispensable in any system of representation, if that word is to have its plain meaning. The first is that those who are to be represented know what they want; the second, that they are able to express what they want; the third, that they are sufficiently interested to utter their wants.

If we closely examine the knowledge of the electorate we must admit that it is sadly deficient, especially since the knowledge with which politics is concerned is mainly the control of the behaviour of individuals and groups separated from the voter by distance, wealth, culture and occupation. It is obvious that the citizen's knowledge is very strictly limited to his personal daily experience. He learns the nature of the things which he does to others; and this, but very vaguely when the effects reach out far into society; and almost nothing of the cause of the things which are done to him, especially by the distant Fates of industry and politics. We may divide the scope of his knowledge into (a) that which he has at first hand and (b) that which he has only upon report.

**First-hand Information.** At first hand there are his family relationships and the tangled skein of experience spun therefrom.

He learns something, sometimes very much, of human character and its varied manifestations. He gets to know something of the medical profession, and of religion and the Churches. He has some experience of the army or the navy, in some countries by family hearsay, in others, where there is conscription, from actual service. Most people come into contact with the police at one time or another, if only by a thread of silver. The local mayor or prefect, or member of parliament occasionally reveals to them that they are governed, or that they are possessed of sovereign power, causes them to swear at public extravagance, or be inspired or amused by official regalia. The post office is known from childhood. The tax and rating departments become stern realities. As jurymen some have even assisted in the administration of justice. Thousands find places on local government councils. At home there is the eternal talk of prices and wages ; at work that of wages and prices. There is the school with its routine and compulsions, its ambitions and opportunities. Transport is a daily preoccupation ; the theatre, the cinema, and sport offer an occasional excursion into a realm of experience in which the citizen plays neither a wholly active nor a quite passive part.

Even the most thoughtful man or woman cannot extract from this the knowledge needed to rule hundreds of millions of people with international connexions. The field of facts is too narrow. If it is effective in stimulating wants, desires and dreams, it has but little relation to *social possibility*. Even in the stimulation of interests and desires, the daily round is not profoundly effective, and it has required a great deal of agitation, or exceedingly bad times, to teach effective lessons, and overcome the soporific effects of Habit. How Lassalle in his anguish denounced the 'cursed needlessness of the poor'!

It must be admitted that for men and women who earn their living in industry, commerce and the professions, an additional source of understanding is open and sometimes, in the most conscious and public-spirited, it extends to deep knowledge of technique and the social and economic relations of their work to that of other groups. Of course, the development of Employers' Associations, Co-operative Societies,<sup>1</sup> and Trade Unions, has done a tremendous amount in recent years to accumulate and spread knowledge which is of the very essence of public affairs. But for the rank and file of employers and employees and of members of the liberal professions it is rather a limited personal experience which informs and moves them. Think of the railway ticket-collector, the postman, the grocer, the bank clerks (who, by the way, imagine that they are the perfect professors of Economic Science), of the bus-driver, the miner, the textile worker, and multitudes of others who constitute the modern community and ask, what would

<sup>1</sup> There are about 15,000 on the elected Management Committees of the British Co-operative Movement.

they know of any fruitful use to government, even of a rural district council, if no external agencies existed to discover and report to them the things they do not and cannot otherwise know? Save for the help of a few, we should be at a standstill. *Wants which are largely the issue of instinctive dispositions could be expressed; but how to prevent these from causing collisions with their undesirable consequences, how to attain them in an order of priority which would neither balk the desire nor kill the possibility of its satisfaction, whether the satisfaction is in any degree possible—these things are not to be learned in the appropriate degree from the common experience of the average man.* It requires years of close and constant application to master even a single branch of public affairs.

**Education and Publicity.** Infinitely the greater part of knowledge of public affairs is obtained by report. All the modern instruments of education and publicity give this instruction and, further, dogmatize about the best way to satisfy wants. Without this the voters would be ignorant indeed, and utterly puppets in the hands of wilful men—not that the puppets would always act, for they might be too wooden to do so. The apogee of the ‘governing class’ lay in that era when certain families had much to obtain from governing the country, and before either education or parties had influenced the voters.

The principal agencies of instruction other than Political Parties in public affairs, are Books, the Newspaper Press, Schools, Clubs, Churches, the Cinema, Broadcasting, and Hearsay.

**Books.** The value of books depends upon their accessibility and the possession of leisure. Books have become easily accessible to those who really want them by the extension, in our own time, of public libraries, in spite of the parsimony practised by many local councils.<sup>1</sup> Further, political parties, co-operative societies, trade unions, lend books, and one will find, in England and Germany at least, a small number of volumes at local party headquarters. An obstacle which is not entirely insuperable is the unwillingness of many municipal councils to provide books which shock their morals and political principles. There is an *index expurgatorius* in everybody’s mind, and extremists of all kinds on local library committees apply it.

There is much more leisure to-day than at any time since the industrial revolution took most people away from agricultural pursuits; and it consists of all the hours of the day which can be seized from rest and sleep, save eight or ten for work, besides one to one-and-a-half clear days in each week. This would be clear gain were not economic pursuits extremely monotonous and fatiguing, and

<sup>1</sup> The annual expenditure of local authorities in England and Wales alone is over one million pounds. Cf. *Annual Local Taxation Returns*, published by His Majesty’s Stationery Office. Cf. also *Report of Public Libraries Committee*, Cmd. 2868; 1927.

distances between work and home long and jading.<sup>1</sup> Is not leisure, the average person will ask, for living? For conversation, music, the theatre, the cinema, for one's family, for dancing, for dress, love-making, sport, hobbies, drinking and smoking, and the lethargic delight of arm-chair fantasies? The books are accessible, there are some hours, though not as many as appear on a surface calculation, for study. Does the mass of mankind read the books which will give them a clue to controversy and control of the sources of power? Common experience shows that they do not. Novels are read, and the newspaper whiles away the rest of the time.<sup>2</sup>

It requires a large amount of passionate interest, and the concentrated attention which comes of that, or intellectual power, or habit, to attempt the mastery of a serious study of a public problem. Few people have such a passionate interest, few have been trained in the habit of purposeful reading; and *even when these are present the mind itself can in only rare cases hold out for the necessary time to master an argument.* Every university teacher knows that only five or six out of every hundred students can show first-class qualities, and fewer still, originality, although students are helped in every way.

The conclusion is, then, that the masses of voters do not, and will not until education has assumed new shapes, read for themselves—and that many will never be able to profit from it—although the opportunities exist and are improving. Any reader can think of twenty books in each country which all voters should have read as the absolute minimum necessary if they were to be able to select and check their representatives independently of the very parties themselves who recommend these representatives, and are they likely to have read even one?

Even then, in spite of conspicuous exceptions, how much real significance have the crude, unassimilated, distorted values of the self-taught man?

**The Newspaper Press.** This is not the most important feature of modern civilization, but it is one among the most important, especially in regard to the electorate.<sup>3</sup> Briefly, these are its qualities. In every country, printed news and opinion, attractively written and

<sup>1</sup> Cf. *Final Report of the Adult Education Committee*, 1919, Cmd. 321, p. 6. (To meet the growing demand)—'the first step must be to deal with the conditions which at present stand in the way: such as excessive hours of labour, fatigue—whether due to monotony or to unduly exhausting work—insecurity of employment, lack of holidays'; *Summary of Reports of the Commission on Industrial Unrest*, 1917–18, Cd. 8696.

<sup>2</sup> The popularity of cross-word puzzles shows that a large amount of mental power of low potential was left quiescent until the petty stimulant of a puzzle awoke it. (Further there is no punishment for those who cheat or fail in their solutions.)

<sup>3</sup> Cf. Kennedy Jones, *Fleet Street and Downing Street*; Lippman, *Public Opinion*, 1922, and the *Phantom Public*, 1928; Norman Angell, *The Press and the Organization of Society*, 1922; Beaverbrook, *Politicians and the Press*, 1925; Lucy Salmon, *The Newspaper and Society*.

produced, are purchaseable at an exceedingly cheap rate, so that few people go a single day without reading a newspaper or conversing with somebody who has. It is the most widely disseminated single agent of instruction in the modern world. Newspapers can be sold at a ridiculously small price because they earn tremendous sums by carrying advertisements. They are private property, and are subject to no greater measure of public control than the laws relating to libel, obscenity, blasphemy and sedition.<sup>1</sup> Otherwise, no enactment, no public institution, or official, regulates or challenges their veracity, for Truth is private property. Upon public affairs the newspapers serve out news and opinion. A part of their material consists of plainly reported news or complete or reduced reproductions of important public documents. A part—the leading articles—consists of comments and short essays, upon events and policies, and the reports of experts in some branch of public affairs. The 'news' section, the representation of fact, varies as among different countries and different newspapers in each country. Several newspapers with a fairly wide circulation in each country give great attention to news, reproducing parliamentary debates in great detail, to Government announcements, to the actions and declarations of representative bodies of industry, society and the churches, to events abroad, to the findings of commissions of inquiry. There is more such attention in England, the Dominions, and Germany than in the U.S.A., or France.<sup>2</sup>

The material thus provided is of the highest value for an independent and detached view of politics; but the circulation of the newspapers which give the largest amount of space to this is small compared with that of others. It may be doubted, too, whether either interest, time or understanding are adequate to the full opportunity they offer.

Another portion of the newspapers undoubtedly receives more attention—that is, the plainly political, which here means the biased, part. Here fact and interpretation of fact, the past, the future, the hypothetical and the prophetic, are mixed and served together. But each newspaper has a tendency and dogmas. Those who are conscious of them tend to become permanent readers of the paper whose bias is nearest their own; or some signed articles may hold them out of

<sup>1</sup> The best descriptions of the law relating to the Press are to be found in Dawson, *The Law of the Press* (1927) (England); Barbier, *Code Appliqué de la presse* (2nd Ed.). Cf. also Duguit, op. cit., Vol. IV, Sects. 35–7 (France); Mannheim, *Pressezrecht* (1927), and Haentzschel, *Reichspresgesetz* (1927) (Germany); Hale, *Law of the Press*, 1923 (U.S.A.).

<sup>2</sup> E.g. in England, *The Times*, *The Daily Telegraph*, *The Manchester Guardian*; in France, *Le Temps*, *Le Matin*, *Le Petit Parisien*, *Le Journal*; in the United States, *The New York Times*, *The New York World*, and non-metropolitan papers like the *Chicago Tribune* and the *Washington Star*. There is also the *United States Daily*, published in Washington, which consists of nothing more than reports of official events and policies; in Germany, *Berliner Tageblatt*, *Frankfurter Zeitung*, *Vorwärts*, *Münchener Neueste Nachrichten*, and the *Deutsche Allgemeine Zeitung*.

respect for the writer. The owners know the tendency they wish to spread, and they can guess the circles where they will find support. There is such a close community of feeling between the directors of a newspaper and their readers that it is difficult to say how far the newspaper actually pushes opinion beyond the point independently reached by the readers. Certainly the paper confirms and strengthens the reader's opinion, and gives him confidence in it : reasons appear there in plain words, while in the reader's mind they only float about vaguely and unformed ; and he is often convinced that what he reads is what he meant to say—although common experience proves that we may easily deceive ourselves about this when we have the habit of relying upon authority. At the same time, the proprietors and the editors are not unconscious of their constituency—the paper must not shock too much or the sales will decrease and revenue from advertisements will fall. Consequently if the newspaper makes its readers it is also made by them. The newspaper, however, has a great power, for it may produce an effect upon the mind, and then raise a fresh issue to ward off the punishment which might have followed its deviation from the expected.

The knowledge that newspapers can exert an influence causes groups with special political creeds to acquire them and to use them quite avowedly to propagate their policies. In France, in fact, this is done with a candour more conspicuous than in the Anglo-Saxon countries, and plain political opinion in the newspapers is not so encumbered with news.<sup>1</sup>

Now all this would not cause the distortion of beliefs formed by independent experience, technical reading, and impartial teaching, if readers knew quite clearly that the papers deliberately hold and inculcate a biased attitude of mind. Then readers could agree or disagree, consciously. But, in fact, a large proportion of the public is quite unconscious, and an even larger proportion is only dimly conscious, that they are the subjects of an everlasting mental operation conducted by unlicensed practitioners.

The mass of readers is attracted to a newspaper not by its political tendency, but by other qualities entirely. Every conceivable domestic and social interest is catered for : we have an avid curiosity about our fellow-creatures. All newspapers have succumbed to pictures, some carrying hardly any letter-press. Their psychology is sound, though one may despise their ideals : for newspaper pictures appeal to the unimaginative, those unserved by their own wits and unable to read and think connectedly for a space of time. Picture-papers have the

<sup>1</sup> Cf. Jacques, *Les Partis Politiques sous la Troisième République*, Paris, 1912 ; and Hayes, *France : a Nation of Patriots*, 1929. Among recent or contemporary statesmen Camille-Pelletan, Clemenceau, Barthou, Millerand and Briand deliberately used the newspaper of a small coterie as a means to a political career.



greatest circulation. Important attractions are the news of crime and accidents, festival and ceremonial gatherings, preferably of those high in society. Theatrical news (especially scandals), puzzles, and 'comic strips' open the minds and mouths of millions. Most attractive of all, especially to men and boys, is sporting news, principally horse-racing.<sup>1</sup> This social entertainment vastly preponderates over political news, and the placards confess what is really attractive. Invariably their slogan includes the words: *disclosure, mystery, sensation, surprise, startling*. The gift of insurance benefits is another factor in the Delilah power of the Press. All this blankets the eyes of the ordinary man and woman, and they swallow opinions at which they might pause if there were anything to give them pause. If they knew who and what interests were dictating the policy of the paper, or if policy were separated from news, they might be vigilant. But no law compels the regular declaration of the politics of the chief owners and editors of the paper.

Of graver importance is the practice of summarizing the contents and meaning of political events in 'headlines', that is, in a telling though ungrammatical sentence of anything up to ten words. Whether the distortion is intentional or not, distortion there is; and these reiterated distortions are too often the only political intelligence which the reader hurrying to work or homewards, or snatching his lunch, ever has the time to absorb.

How then can the influence of the Press of our own day be judged? (1) Few people use the newspapers consciously as a basis of independent study. (2) Many consciously subscribe to a paper because it preaches approximately the political creed they already hold. (3) The newspaper can develop these creeds and apply them to the events and policies of the day and take its readers along with it. It acts as a common worshipping-ground, confirms opinions, and encourages resistance. Hence dictators suppress opposition-papers knowing that this will at least cause a dispersal of the mutually inspiring communicants.<sup>2</sup> The newspaper is able to tide over any unpopularity with its readers if it cleverly picks up and drops 'stunts' and covers an advance or retreat with attractive 'features'. If, for example, after covering a political opponent with mud, the public decides that the real reposi-

<sup>1</sup> A good racing tipster is an important asset of every newspaper which aspires to several editions a day and a wide circulation. During the General Strike of 1926 in England my hairdresser dolefully summed up the situation in regard to newspapers thus: 'Terrible, ain't it, no newspapers! Why, it's like a day when there's no racing!'

<sup>2</sup> Cf. Mussolini, 16 July 1923 (*Mussolini*, by Barone San Severino (Dent), 1923). Fascism claims that Italy 'is too poor to be able to afford the continual nervous strain and frittering away of energy. The formula is: Criticism is allowed, but not opposition'. Moreover the Press 'must be at the service of the nation, for the nation must be defended by all Italians without distinction'. Cf. Schneider, *Making the Fascist State* (1928), pp. 96, 316.

tory of the mud is the newspaper proprietor and not his opponent, the proprietor then assumes the pose of one 'who takes his licking like a sportsman': where he once fulminated he now fawns. (4) In the minds of the unsophisticated and unwarned, and large numbers of the electorate are so, ideas are silently and skilfully implanted, since, while unguarded, they consume untruthful 'headlines'. (5) Newspapers are most often avowed or unavowed tools of a particular political party, though the editors and proprietors may occasionally revolt owing to differences with the party leaders; <sup>1</sup> but their affiliations are not always known to the public.

The amount of objectively true information and balanced opinion is, on the whole, small, and the Press has acquired an extraordinary dominance over opinion, aggravating rather than correcting its defects. *A great deal of organization and education are required to overcome its power over untutored minds, and such education and activity in fact falls to the political parties.* That the power of the Press is not so great as is supposed, that its effects are, as it were, suspensive of truthful opinion rather than quite destructive of it, can be seen from the steady and rapid growth of the great parties of dissent in spite of the daily opposition of newspapers whose interests and political creed were entirely hostile to the majority of their readers. These continue to read the paper but vote against the paper's persuasion. The most widely read newspapers in the countries with which we are concerned, until recently in England and the U.S.A., almost the only newspapers, were owned and directed by what may be broadly called the 'capitalist' class. Yet great parties and groups of dissent against their creed arose. But it must be admitted that the newspaper can and does enslave the uneducated, if not for always yet for a time. And time is of the very essence of politics. Its battles are fought in terms of months, years and generations.

**Two Limitations on the Power of the Daily Press.** There are two factors which very much limit the power of the daily Press. The first is that even within the ranks of those who broadly uphold and advocate present social organization there are differences of opinion, so that in the long run they openly criticize each other's arguments and uncover each other's special motives. They do not operate as a unified mass against the worker, or the Government, as such writers as Norman Angell seem to assume.<sup>2</sup> Secondly, by the side of the General Press there is in every country a very influential special Press catering for and reaching the members of special professions, interests,

<sup>1</sup> Cf. the list of tremendous deeds done by Lord Beaverbrook as recorded in his *Politicians and the Press*. His Empire Crusade Stunt is particularly instructive. Cf. Martin, *Political Quarterly* (London), Vol. I, No. 2, and the London Press of March, 1931. Cf. the detailed analysis of the relations between the English Press and the Political Parties in Hartman, *The Press and the Modern State* (1930), unpublished thesis, University of London.

<sup>2</sup> Norman Angell, *op. cit.*

pastimes, and religions, and these counteract the influence of the General Press by their exact information on special subjects and by their sectional comments upon general affairs. They provide their readers with criteria in which they have more trust than in the General Press.

This is not the place to examine the possible remedies for this marvellous instrument of modern education—for such it is despite its grave defects.<sup>1</sup>

For the general public the newspaper is of more influence than the book in the creation of political opinion.

**The School** is of surprisingly small value in the creation of independent political opinion. Let us divide and discriminate. We may speak, broadly, of Elementary, Secondary and University Education—as it is.<sup>2</sup>

In the Elementary Schools attended by the mass of children until about the age of fourteen,<sup>3</sup> what is taught? There are the introductory subjects like reading, writing and arithmetic; elementary natural sciences and handicrafts, and of sole importance as an approach to public affairs—history and geography. The chief features of this instruction are its scantiness in terms of the time which can possibly be devoted to it,<sup>4</sup> and the curious way in which the subjects have in the past been studied and taught. Even in the best schools in the most advanced educational systems, history has suffered from undue attention to battles, kings and great men, with emphasis upon pretty-pretty stories about them, while the fundamental forces in the evolution of society, the economic, the social, the doctrinal, the technical, have been ignored. The 'nation' is considered as a solid and homogeneous unit without internal troubles or conflict; and, further, is almost universally considered the sole standard by which the rest of the world should be judged. Geography has been too national, an

<sup>1</sup> We believe, however, that there would be a truer representation of political thought and feeling if every newspaper were compelled by law to disclose at every issue and upon its front page in very large type (a) the names of its principal proprietors with the number of shares held, the clubs to which they belong, and a sworn statement of the parties for whom they voted, say, in the last half-dozen elections, (b) the names of editors and the leader-writers each day, the clubs to which they belong and a sworn statement of the parties for whom they voted in the last half-dozen elections. Difficulties would arise in putting this into practice, for no one could be sure that the statement about the votes was true, and proprietors could surmount it by patriotically not voting at all, thus attesting their impartiality. It is true, also, that such a requirement would infringe the secrecy of the ballot; but this cannot possibly weigh at all against the tremendous political power which the community allows newspapers to exert without let or hindrance.

<sup>2</sup> The following analysis is made with the facts of all four countries in mind.

<sup>3</sup> The school-leaving age is: 14 in England, 13 in France, 14 in Germany. In the U.S.A. it varies among the different states: In thirty-one states, it is 16; in five states, 18; in five states, 17; in five others 14; and in three states, 15.

<sup>4</sup> E.g. three hours per week were devoted to the teaching of History and Geography in a typical city elementary school in England (cf. *Educational Year Book*, 1925, p. 485). Five hours per week were given to these subjects (including civics) in a Prussian school (*ibid.*, p. 522).

enormous time being spent on learning trumpery natural features by rote, and long lists of products made or grown in different parts of the world.<sup>1</sup> But the dynamic factors in race, the distribution of peoples, climate, migration, and commerce do not receive appropriate attention. At the very best the Elementary School is a beginning ; unfortunately, in the present context, it is for most the end of all disciplined schooling.

In the Secondary Schools, High Schools, Gymnasias or Lycées, history and geography are pursued further, and some attention is paid to the characteristics of other countries when the usual two modern foreign languages are taught. A little more than the few miserable stories of the elementary schools is recited, and in some schools, where the headmaster, and the history and geography teacher are adventurous and wise spirits, the few good text-books are introduced, and by the age of sixteen the pupil has learnt enough at least to begin to inquire and read. How rare are such teachers and how rare such books ; how inadequate, too, is the time for these studies ! The career approaches ; and cramming for examinations is imperative. Some secondary schools teach a subject called Civics,<sup>2</sup> which is an introduction to public affairs, but such schools are few, and it is a hole-in-the-corner course. In the Commercial Secondary Schools there is an introduction to economic theory, economic history, and ' commercial ' geography, and this, when taken seriously as a large part of the curriculum, is a useful step to a knowledge of the conditions of government.

However, any close and honest examination of the contribution of secondary schools in all countries clearly shows that three things stand in the way of an education which could fit pupils to grope their way to an independent judgement of public affairs : (1) the lack of teachers with the appropriate knowledge and skill in imparting it ; (2) the lack of proper text-books and other equipment, such as cinematograph machines, pictures, and books other than text-books ; and (3) the staring grim fact, that children are not sent to school to become authorities upon public affairs but to learn to earn their living in some special vocation.

We know that the national supply of good teachers is small ; those who have the talent and the vocation are very few. Till recently teachers were badly paid, and as a rule only the timid and mild mannered who were likely to fail at other things turned to teaching. The higher salaries now paid induce the entrance of others who are not merely finding a refuge from a rough world. Yet it is impossible to find as many illustrious teachers in a nation as are required, given the large number of children at school. We are rather condemned to a large body of mediocre (many worse) teachers, with a few sublime exceptions. A good many of them, tied down in large classes (which

<sup>1</sup> Cf. Gooch, *The Way Out*.

<sup>2</sup> In Germany, *Staatsbürgerkunde* ; in France, *Instruction civique*.

are unavoidable, given the average wealth of the parents and the weak will and capacity of the State to subsidize the schools), wear out very soon, in spite of long vacations, and, enslaved by routine, become bitter, nervous wrecks, the saddest specimens being among the women. Nor can they avoid a blunting of mind and sensibilities, for the school must regularly continue and lessons be given, day after day, whatever the season, and whether or not they are in the mood to teach. This is an exacting task if taken seriously: one must apply the mind and body, and adjust the nervous system, to maintain attention, to excite and coax the backward, and induce a continuous interest in the subject.<sup>1</sup> It must be remembered, also, that teachers are not at liberty to devote themselves to one subject or a group of cognate subjects, but are expected to profess 'subsidiary' subjects. This is all a question of cost. Further, the present generation of teachers received their education from those who had not experienced the effects of modern research in history, politics and economics.

Secondly, owing to the short time available and the importance of obtaining examination results, text-books form the principal reading; and even these summaries of summary summaries are not read all through but heavy leaded type captions stand guard over the portals of the rest, crying out, 'Read and remember me, if nothing else!' How much has to be done, if there is to be any improvement where our present interest is concerned, can be seen in *Sanderson of Oundle*, by H. G. Wells, and the same writer's comments in the *World of William Clissold*.

We come to the final count, and that is the prior necessity of earning a living. The standard of living lashes and goads the modern world. It causes parents to fling their children into school, whether they like it or not, and snatch them out again in time to get a job. They may stray a little to pick up some accomplishments, and, of course, if they insist upon straying altogether—there is nothing to be done. The mercenary is the chief motive to secondary education, and only those with expectations and the financial means of a political career, or the very few who are brave enough to dispense with expectations and financial rewards, can make the secondary stage the beginning of political understanding. Thus, of all the numbers of secondary students, only the moneyed 'governing classes' and the mentally adventurous may pause to profit; the rest rush helter-skelter out of the doors of school with some true and many false notions, and with the mind closed, rather than made eager—to be governed, inevitably, not by their own qualities, but by other people's.

<sup>1</sup> I am no foe of women teachers, and I am certainly an opponent of the policy of excluding women from the teaching service upon marriage. I should deliberately exclude any woman from teaching after the age of thirty unless she had married. The psychologist will understand.

Owing to the expense and the necessity of finding work, only a tiny fraction of the population enters the university stage. Those who enter do so mainly for a vocational purpose and specialize in a particular technique; only a very small proportion undertake studies which offer an approach to politics. Only those who learn History, Law, Political and Economic Theory, Philosophy and Ethics are being fitted for comprehension of the political world, for they alone are learning something of human groups and their inter-relations. Even among these, there are stages of wisdom. The specialists in the political sciences are very few, though the present tendency is for a rapid increase in the numbers. That a university education may provide a man with a negligible endowment of political wisdom is to be observed from conversation with the average medical practitioner, engineer, clergyman, solicitor, bank manager and, in a lesser degree, school-teacher. People are often shocked when they observe for the first time that some of these very capable craftsmen are quite uneducated outside the narrow sphere of their own activities, necessary and humane as they are. Yet no one would expect, as of necessity, that a capable carpenter should *ipso facto* be a political oracle.

The net conclusion is that schooling, in its present state, may do much to prepare people to make a living, to exercise special skill, and even to enjoy leisure, but it does very little either to prepare or train the mind to prepare itself, competently to understand and judge social relationships in the nation and the world. No one, surely, would go to the other extreme, and claim that schools turn out students highly efficient therein.

So far, then, as schools are concerned, the irresistible conclusion is that the mass of mankind are destined to become what the Germans aptly call *Stimmvieh*: that is, voting-cattle. Against this, very slight headway is being made by adult education in evening courses, such as those provided by the W.E.A. and Adult Education Association in England, the *Ligue de l'Enseignement* in France, the *Gesellschaft für die Verbreitung der Volksbildung* in Germany, and the Association for Adult Education in the U.S.A.<sup>1</sup>

**The Cinema and the Radio.** These two instruments have enormous potentialities, for at a cheap rate they can reach almost everyone for long periods of time, and they do not exact the more difficult kind of attention necessary to master a printed argument. The cinema has fallen for the most part into private hands and has become almost exclusively a means of entertainment. It is enormously popular because it preaches with fanatical vehemence the ultimate and holy triumph of the Ten Commandments by showing with tropical imagina-

<sup>1</sup> Cf. Mansbridge, *An Adventure in Working-class Education*, London, 1920; *The Scope and Practice of Adult Education*, Paper No. 10 of the Adult Education Committee, London, 1930.

tion, naked detail, and beautiful men and women, the attractive consequences of their disobedience. Of recent years there has been a conscious mobilization of 'educational' films, and much may be done therewith; but even in the schools they are not highly popular, and a cinema manager takes a grave risk with an 'educational week'. The sound-films are, I am sure, destined to become a most potent means of education and all political parties will soon possess portable apparatus.

The radio is of very unequal value. Its best development is in Great Britain, Germany and France; in the U.S.A. the radio awaits rational public control. The policy of the British Broadcasting Corporation is to give about one hour per week to the discussion of subjects which may be called 'political', and the intellectual standard is about that of the Workers' Educational Association classes, sufficiently high if large masses of people came under its influence.<sup>1</sup> But so far the development is in its infancy and the time actually devoted to it is small compared with the long succession of plodding hours needed to master the vast range of complicated facts especially in the form of organized discussion groups. The potentialities are enormous, and we are reminded of Carlyle's dictum that the true university to-day is a library of books! Yes, for him who is by nature a part of the *universitas*! Shall we not see again what we have seen in respect of the newspapers? The majority of minds attracted by the crude, the sensational and the vulgar, or by all that is sublime in artistic feeling and expression, but revolting from disciplined study of the science of government?

**Churches, Clubs, Social Intercourse.** Before we draw the conclusion from this brief analysis of the agencies of tuition we must include the churches, the clubs and social intercourse.

The churches were once the great and almost the only teachers of social duty; and every church still secretes a set of social doctrines, the scope and import of which derive from the peculiar teleological answers to the fundamental questions of men's existence. The recent

<sup>1</sup> Cf. *Handbook and Directory of Adult Education*, 1928-9: On broadcasting policy see pp. 134, 135; *Commission on Educational and Cultural Films*, Papers No. 1 and 2, Feb., 1930, July, 1930; *International Handbook of Adult Education*, published by the World Association for Adult Education, 1929, especially pp. 149 ff., 163 ff., 436 ff., and the Introduction.

Cf. op. cit., *passim*, for the position in the different countries regarding free libraries.

Cf. also *World Conference on Adult Education*, Cambridge, 1930, published by the World Association for Adult Education, 1930: Especially the discussion on the Radio in Adult Education, p. 267 ff. This discussion brings out one thing very significantly, that the citizen can never hope for a special and adequate attention to his needs as a voter—many other interests must be satisfied; and only a very small amount of time can be accorded to political education.

A very relevant problem is admirably handled in *The Tutor on Adult Education*, an inquiry into the Problems of Supply and Training, published by the Carnegie United Kingdom Trustees, Comely Park House, Dunfermline, 1928.

researches of Troeltsch, Weber and Tawney have insisted upon the importance of these doctrines for the economic and political evolution of modern societies.

It is not so much the moral pressure of the churches in politics that interests us, but their intellectual contribution to the understanding of political argument, not that the two can be entirely separated, for the fear of the particular Hell or the love of the particular Heaven of any church infallibly closes many minds to any argument at all which disputes the beliefs respecting the supernatural. Every church professes a body of ethics which consists of principles of human obligation and rights deemed to be universally valid. It is obvious that, in so far as the communicants have really mastered the verbal arguments addressed to them in schools and sermons and the history of their creed and group, and, in so far as they really believe what they have heard and read, there must be large bodies of opinion employable as a criterion of political problems. These bodies of opinion cut across each other, sometimes agreeing, more often violently disagreeing; and they are specific and often very rigid attitudes of mind.

Some even enter into questions of the day; for example, into education, temperance, marriage and divorce, the emancipation of women.<sup>1</sup> And in our own time the churches have begun sedulously to occupy themselves with labour conditions, sporadic movements called generally Christian Socialism<sup>2</sup> commencing in the middle of the nineteenth century. The Papal Encyclical of 1891, for example, gave an impetus to Roman Catholics to occupy themselves with finding and embracing an industrial policy. These tendencies are becoming strengthened, and churches are now specially sensitive and proud of their answers to economic and social problems. They are a little ashamed of one thing only, their inability always to preach the gospel of peace; but this, of course, is the unfortunate fate of all who occupy themselves practically with man's actual lot. Christ himself brought a sword.

The teaching is, however, on the whole rather vague; the body of knowledge is small, and the people who may be supposed to be really influenced thereby are very few. For, whether for good or ill, our era is not an era of belief; and though for many the gospel of a church has still that commanding significance which only belief in

<sup>1</sup> For example, the Report on *Education* presented to the Conference on Christian Politics, Economics and Citizenship at Birmingham in April, 1924 (Longmans, 1924). Similar Reports have been made on *International Relations* and the *Social Function of the Church*, etc.; the literature on Prohibition issued by the Federated Churches of America; the literature of the *Volksverein*, the educational department of the Catholic Centre Party of Germany. Cf. the recent (1931) Papal Encyclicals on *Marriage and the Family*, and on *Socialism*.

<sup>2</sup> Cf. Raven, *Christian Socialism: A History*, 1920; Woodworth, *Christian Socialism in England*, 1903.



another-worldly scheme of values can give, their number is far outweighed by perfunctory attendants. The country is more 'religious' than the town; the villages and townships of the U.S.A., for example, still give a powerful impetus to its politics; and the Catholic strength in France and Germany is so formidable that pitched and long-drawn battles have occurred between secular politicians and churchmen. On education their influence has been and is weighty. On the whole, however, the forces which would have drawn men to hear the social doctrines of the Church have become so weak that the churches have undertaken their study and instruction largely for their own preservation; and yet they are tortured and broken upon the rack of their followers' economic and local dissensions, as witness the difficulties of the Centre (Catholic) Party in Germany and the parties of the Extreme Right in France. Nevertheless, the churches speak when men are in a peculiarly receptive mood, and there is no doubt that they are efficacious in creating a political mind independent of other and outside agencies.<sup>1</sup> They do not go far with the mass of people, but they can excite these when their privileges are attacked.

There remains the hearsay of Clubs and Social Intercourse. More than at any time in the previous history of the world does man come into relation with man. Communication and transport are so rapid, and division of labour so takes people from their own homes and mixes them together at work and in their leisure that, willy-nilly, they learn something of each other's experience, needs, aspirations, and values. It is true that these contacts are irregular, a little incoherent, often more trivial than the conversations reported in *Babbitt*, but they take place over a long series of years and tend to cure purely personal preoccupations, and there is force in the astonishing realization that there are other people in the world. It is idle to imagine that the knowledge and opinion thus diffused can possibly be gauged in any quantitative fashion, but it is obviously important; and if we can judge by changes in fashion, in the vulgar tongue, in the spread of rumours, and changes of political allegiance which have been produced quite definitely *not* by the agency of printed opinion, it must be very important in quantity. Its quality, however, is bad: it is based upon all sorts of hearsay, evidence of the most doubtful value, complete nonsense, and logical operations so crude and false that one would swear to their impossibility were it not for the direct evidence of one's senses.

**Party is King!** We surveyed the extent to which the mass of voters are independently capable of judging public affairs, since only if they are capable can they know how they wish to be represented. We have seen that a number of agencies of instruction exist apart

<sup>1</sup> Cf. the Papal protest against the Fascist attempt to monopolize the education of youth in the interests of "the pagan state" (*Universe*, July, 1931).

from the direct experience of the individual voter. We found that his *direct* experience is limited and special and produces *desires*, but little knowledge of social *possibilities*. What can we say, in general, about the agencies through which experience of social events and problems are obtained at second-hand?

The vast mass of voters are entirely innocent of objective knowledge of political possibilities. Their disciplined study is of the slightest. A few have a smattering, small in quantity, uneven in distribution, incoherent, without basic soundness. A very small number, indeed, go beyond this and obtain a sufficiently systematic and profound insight into the body politic. The general body of the electorate do not, and cannot, under present conditions, contribute more to politics than some a smouldering, some a flaming, sensibility of their wants and passions. Even these are not clearly focused to themselves, and are hardly articulate without use of the jargon of propaganda. This holds good not only of the poor; it is just as true of the middle and upper classes who have not had a special training in the social sciences.

*A consciousness of wants is the independent contribution of the electorate to representation: but not a knowledge of what is possible.* The electorate is not entirely devoid of an informed sense of the possible, for everyday contact inevitably teaches a good many things—all that is summed up in the terms mutuality, reciprocity, harmony, common sense, morality, and forbearance. But this can only be applied to the problems of government when these are known in all their intricacy, and when their remote, impersonal natures are 'brought home' to the citizen. The power of generalization and abstraction, and of comprehending the significance of general laws is of the rarest.

There is thus a field, which has always been vast, but which in the modern state is colossal, of which the average voter is ignorant and cannot help being ignorant; and he is likely always to remain so. It is the inescapable result of the peculiar civilization of our time, with its economic compulsions and ethical failures. It is not the result of capitalism but of something deeper, and that is economic acquisitiveness serving itself with modern sources of energy and by the aid of a machine as vast and complicated as the great globe itself.

**The Rarity of Native Aptitude.** Nor is this all. The attainment of political knowledge and wisdom is a faculty as special and rare as any other science and art. There are very few first, second and third-rate political thinkers for the same reason that there are very few first, second and third-rate poets, painters, sculptors, dramatists, composers, physicians, constructive engineers, actors, chemists, critics and people of taste. A native complex of qualities called 'aptitude' is needed, besides a technical training. Training and

experience are alike wasted upon the inapt: they can be given if society should set itself to the task, but it is idle to imagine that the distribution of human talent can rise above itself. This is not to say that, given conditions we have earlier indicated, a great deal of ignorance and fallacious method could not be replaced by fact and sound knowledge. And that, obviously, would be, on the democratic assumption, desirable and necessary. This would still leave the intelligence curve as it is, with only a few at its superior end, although it would cause the personal place on the curve of actual electors to be very different from what it now is owing to the operation of present-day factors. The student of government will make many mistakes in the analysis of political institutions and their operation unless he has in mind continually the broad results of certain well-known tests of intelligence.<sup>1</sup>

**The Low Potential of the Mass.** There is one thing more, of at least equal importance. The mass of men and women are not self-excitabile except occasionally and for a few brief moments, and concerning one or two special interests. In regard to all other things they are permanently apathetic and bored. Even if they know, they do not feel. There are as few geniuses of emotion as of intellect or art. To use the language of motor transport, the mass of people are not 'self-starters'. Some agency is needed to excite them, and on special occasions, like elections, concentrate a heavy and unrelenting bombardment upon them, enforcing their attention.

\* \* \* \* \*

Now what all the other agencies do not do, teach; and what cannot be done without special organizations, namely, to gather the talented and stimulate interest,—political parties set out to accomplish. They gather the knowledge and the capable practitioners, and we must now consider their methods, and ask how far they are successful.

Let us make no mistake: political parties do not perform this function simply because they want to: it is not entirely an elective virtue of theirs: they are in part compelled. For the first commandment of a political party is victory. Victory is found also written even unto the ninth of its commandments. The tenth, enforced by experience, the general sense of honesty, and one's personal integrity, may counsel other courses. By choice, the party would be victorious; virtuous it is only by compulsion. 'Buncombe' is the homage which electoral virtue so often pays to electoral victory.

**A Continuous Organization.** The organization operates incessantly, partly because victory in parliamentary elections is otherwise impossible, but also because in the modern state there are many local elective offices to fill. In France, also, the Senate is

<sup>1</sup> Cf. Pillsbury, *Essentials of Psychology*; Terman, *The Measurement of Intelligence*.

partially renewed every three years, and in America and Germany there are State as well as Federal elections. Although in the U.S.A. much has been done to bring about a coincidence of elections, the elective periods are too heterogeneous to perfect this. So the organization, the machine, the caucus, the workers, are always on the watch for movements of their opponents, and the opportunity to 'swing' over blocks of votes. There are slack periods, but none entirely dead; and informal talks and formal councils are always in progress. Reputations fluctuate as their owners legislate, administer, or conduct campaigns, and men and women are marked out for various positions.

This, the *permanence* of organization and activity, marks off the parties of the present from the parties of three-quarters of a century ago, and the parties of England, Germany, U.S.A. from party organization in France. For before the middle of last century political parties were loosely organized and quiescent between elections, sudden mobilization taking place just before the election and demobilization after polling day, while in France (and in many other countries) that condition still very largely pertains.

More recently the parties have added another source of power: they deliberately set out to capture the young people, long before they are of an age to vote, and this is done by the creation of Leagues of Young Socialists, or Friends of the Children (!), or the Junior Imperial League, or Pioneers, or Communist Youth, Young Liberals, Fascisti, who are not so much taught as drilled. The impulses of human rhythm and harmony are exploited by demonstrations, processions, singing, and self-decoration. In this sphere Germany was first and is most developed; England holds the second place, France the next, and America the last. Thus the party moves towards *all-inclusiveness* from infancy to senility, as well as permanency of organization.

How do the parties operate? We will not make a rigid separation between the all-the-year-round activity of the party and its activity in the few weeks preceding the campaign, but will point out any differences of kind that occur when the period of organization and skirmishing merges into that of the intensest battle. The parties operate through meetings, personal canvassing, the circulation of 'literature', the creation and distribution of posters and slogans, the manipulation of the newspaper Press, demonstrations, and 'pressure'. These methods are common to all parties in each country, and in the different countries the emphasis is placed upon different modes of approach.

Meetings are broadly of three kinds, at the Party Headquarters, in Halls, in the Streets. At the Party Headquarters only avowed members of the party and novices are entitled to be present. The

meetings are regular and frequent. Here the serious business is speech-making by nationally prominent members of the party, and the leading members of the local caucus. Questions and discussions follow the speeches. The speeches are naturally directed to strengthen the party's enthusiasm and numbers, and the tendency therefore is for the speaker to say that all things which the party considers desirable are possible. Only the hopeful may be alleged of one's party, and, electorally, to doubt is to die. The local members are more inclined to listen to doubts expressed by a considerable personage who comes from afar than from one, even a leader, among themselves. The local leaders also learn by such contacts two important things : (a) what the party can do as distinct from the full measure of what it would like to do, and (b) the possible maximum accomplishment even if opponents did not exist. The local workers learn the intentions of the national leaders, apprehend that they are part of a nation-wide community, suffer a change of mind, and cause a change of mind in the speaker. By slow degrees harmony and oneness are approached : it is never a perfect unison, but far from serious dissent.

These meetings are important, too, for their cohesive powers, for they are accompanied by pleasant conviviality.<sup>1</sup> One is the recognized member of a community ! What does this not mean to otherwise rather humdrum and lonely souls ? All these things warm the heart and provide the party with willing workers and preachers not too careful of the rational value of their gospel. Such meetings are more prevalent in England and Germany than in the U.S.A. and France, and less in France than the U.S.A., which has large competition from the Churches and the Y.M.C.A., especially in rural parts, which form 48 per cent. of the whole country. They are less frequent in the parties of the middle and upper than of the poorer classes.

In all countries there are occasional meetings in Halls. They are held on the occasion of some special national or party crisis, when a new policy is being mooted ; or when one of the great men of the party pays a visit ; when a special fillip is needed to party organization—when a ' rally ' is required, or during an election when advertisement and the spectacle of activity are likely to rouse confidence and

<sup>1</sup> On the premises alcoholic liquor may be purchaseable (naturally, in Germany) ; games like billiards, chess and draughts, even snakes and ladders (for the younger or the senile), may be played ; non-smokers are suffocated ; and tea and biscuits are usually provided by the young ladies of the party, a small charge being made for this, except to the speaker. In many meetings, especially in socialist parties, songs from the party song-book uplift the hearts of the rank and file and give them that blushing access of self-importance which comes of singing, according to character, either in or out of tune, or more loudly or softly than the rest, on purpose. Besides, there are concerts and dances at which the young of the party community may exercise their vocal and instrumental gifts in sight of their parents, and I have seen some beautiful things in humble places, contributed by those to whom, perforce, the price of culture is hunger. In France the conviviality is accompanied by wine.

enthusiasm. They are open meetings, though usually the faithful form the largest part of the attendance.

The objective merits of a proposal are not explored with pedantic care. A cut-and-dried policy is artfully expounded. The art consists in appealing to the interests of the listeners while suppressing all considerations of difficulty, or making light of them, or ascribing them to a moral defect in opponents; of drawing special attention to the noble personal character of the speaker and his colleagues; and, especially, of causing laughter. Usually the meeting is kept well under control by a Chairman, and questions are allowed after the main speech. But it has become a well-established custom in England (not so well-founded, though practised, in Germany and France, and hardly attempted in the U.S.A.) to interject short sharp questions. The speakers are expected to answer this 'heckling' good-naturedly; nor are they everywhere expected to answer seriously and rationally; and much of a speaker's success depends upon his ability to glide over difficulties or to demonstrate, with wit, that the question is foolish and the questioner a congenital idiot. I have been astonished at the good humour and tolerance of audiences in England, at their ever-patient long-suffering in the U.S.A., where they do not 'heckle', at their stern but controlled passionateness in Germany, and their turbulence and pithy comments in France. Everywhere better and more questions are asked in the towns than in the country.

In the streets the local workers or paid speakers, the 'party hacks' of the richer parties, gather audiences round them, especially during elections. This is practised more in Great Britain than elsewhere; and in Germany and France previous permission of the police is required. There are no rules of order, save those contributed by the ideas of fair play normally held by the majority. The meetings have the merit that they attract voters who might not go to a hall or party headquarters, and they give the illusion, by determined activity, that the party is out to win. Since the voice, even at its highest natural strength, will not carry far, the audience may drop off. The natural means to prevent this is to drop all subtlety of argument, and to lay emphasis upon the sensational, and the amazing. Consequently, these meetings, though serviceable to the party, are not of the same value to Truth. There is no possibility of close argument and consecutive discussion. Both in the hall and the street a 'demonstration' is more important than technical and logical proof.<sup>1</sup> The audience have neither the time, opportunity nor wisdom to detect and challenge fallacies!

Some of the difficulties of open-air speaking are being overcome by microphones. They enable very large audiences to be reached: but they do not enable the audience to reach the speaker.

<sup>1</sup> The most frequent fallacy is *post hoc ergo propter hoc*.

**Personal Canvassing.** It is the practice in England and the U.S.A.,<sup>1</sup> and to a lesser degree in Germany and France, for the party machine to organize personal calls upon the voters to discover their affiliation and induce them to promise their vote. All canvassing has for its object the production of the largest number of votes for one's own party on polling-day, and it is then it assumes its most intensive and savage form. Canvassing is an ancient practice in the Anglo-Saxon countries, and has consequently been skilfully elaborated.<sup>2</sup> If the voter does not entirely close the door to conviction, the canvasser attempts the task of conversion. To be useful the canvasser must have qualities akin to those of an expert salesman: the psychology of salesmanship is the psychology of canvassing.<sup>3</sup> He must have a commodity for every taste and an answer to every objection; and these must be varied with the client. The canvassers usually learn from the party's handbook, or notes for speakers, or speeches at meetings; they also improvise. On the whole voters are flattered by the attentions of the canvasser: their existence, it seems, is recognized: they are Somebody; and they have a favour to grant which somebody actually begs. Some busy housewives are a little annoyed, and some voters who are disillusioned with the promises of canvassers, maintain a neutral and forbidding blankness which is disconcerting. But on the whole canvassing is liked, and some voters have been known to provide tea for their visitors. The essence of successful canvassing is to be all things to all men, and the canvasser is so much tempted by personal contact with the voter, and the knowledge that perhaps a vote depends upon his talk, that it is exceedingly difficult not to promise too much. Much that is impossible is promised, much that is untrue is told, and there is a large element of non-rational persuasion, especially when the candidate himself canvasses. Men of great private integrity think it proper on such occasions to go along with their wife and their children especially dressed for the occasion. No doubt they are convinced that the end justifies the means. To say this, is to emphasize the extent to which politicians themselves believe the ordinary agencies of education to have failed.

**'Literature.'** Party literature is broadly of two kinds, that destined mainly for candidates and workers, and that to be broadcast among the electorate. In the first class are pamphlets upon special

<sup>1</sup> Cf. Kent, *The Great Game of Politics*; Merriam, op. cit., p. 316.

<sup>2</sup> This is a laborious task, especially among the working class, for they are not accessible until the evening, and after they have washed and eaten. If a voter says he is of their party, their task is to sum up whether he is speaking the truth or not and, in any case, to see that he gets party literature; it is also to judge whether he needs to be called on just before polling-day, whether he can be trusted to go to the polling station or whether he needs to be escorted by a party worker. Cf. Gray, *Confessions of a Candidate*.

<sup>3</sup> Cf. *La Technique des Affaires*, Vol. II, Chaps. XVI-XVIII, by Professor Chambonnard (Paris, 1918).

topics, a periodical, usually a monthly magazine or newspaper, sets of speaker's notes, and, during campaigns, booklets full of 'points' or 'shot and shell'. In the second class are leaflets and pamphlets and the literature distributed at elections—the 'address to the electors' or *professions de foi*. (Material to be printed locally is distributed among several printers to attract votes from each, and at least cause the candidate to be discussed.) The mass of literature is immense, the greatest amount per head being circulated in the U.S.A., the second place is shared by England and Germany, while France is far in the rear. A new practice is to deluge the constituency with leaflets from aeroplanes (France). What are the chief features of this literature? It is inveterately dogmatic, and every fact adduced only goes to show that the party is right. Argument is mixed with facts and figures, the weak points of the opposition are paraded and ridiculed or denounced, while one's own promises are proclaimed as both desirable and possible.

**The Restraints upon Unveracity.** What restrains the composers of party literature from utter demoralization? At the outer limit is the credulousness of their followers, and the more sensible this is, the greater the restraint. But we have already seen that generally such credulousness is rather wild, and if this were the only limit it would not be important. The general political common sense of the community is small when considered from the standpoint of pure independent unprompted judgement; but once the facts and judgements are put before it, even distortedly, it is of *some* critical effect, though it is weak in quality and with little chance of expression. Neither speakers nor literature can be entirely ridiculous.

Further, the majority of speakers and writers are not governed by a cynical estimate of the electorate's acumen as the maximum limit of the liberties which may be taken in addressing them; they very much overestimate the intelligence of the electorate. They do this because (a) the democratic dogma exalts the people, and in democratic communities this appraisal has become an inescapable part of the environment, and because (b) the democratic dogma has produced the social expectation that the representatives of the people shall consciously educate the people. Next, an educated person has great difficulty in 'writing down', so much so, that party workers or agents have often to intervene and tell candidate or party headquarters that certain policies or arguments will not 'go down' with the people. Most men and women have a spontaneous respect for human nature and prefer its improvement rather than its debasement. Nor can the party managers risk the criticism which may at any time come from entirely unexpected quarters within their own party, or from the opposition. The people quickly resent any proven betrayal



of their trust, and though proof is difficult, it cannot be unduly risked. Consequently, party literature is surprisingly above the level that one might expect from a simple consideration of its consumers.

Now its level improves in proportion as three conditions are fulfilled: that a country has experienced long and unbroken political life; that strong and nation-wide party organizations exist; that the number of good and honest men outnumber the rest in politics.

The first condition exists in England, France and the U.S.A. Those countries have long experienced party activity, policies and promises, and sufficient time has elapsed to permit the growth of popular notions of their trustworthiness. The longer that the parties have erred, the greater the popular distrust and cynicism, and, in the same measure, the parties have had to make amends. This is the effect of time—there is a gradual accumulation of wisdom, which may altogether be small, but which, nevertheless, is of value, and can be flouted only at a great risk, which, real or imagined, affects the politician. Further, the freedom of political life is important. Wherever there is repression and parties are enslaved, hostility to the legal system naturally increases, and hostility breeds threats, hopes and promises which would otherwise not be so ardently entertained.<sup>1</sup> Desperation and impotence cause parties to evolve policies out of all relation to practicability. On the other hand, the prospects of office, of the test of carrying policy into practice, has a markedly restraining effect.<sup>2</sup>

Now, two examples of this phenomenon stand out. In Germany, before 1919, representative government existed without responsible government. The great opposition parties, therefore, could never freely participate in administration, nor did any party ever know when, or for how long, it might be called upon to form a government. For some parties there was no prospect of the test of office, for others only a remote one. An extraordinary premium was placed upon the creation of attractive programmes. And, in fact, German politicians and political scientists invented the name *Programme-Parties*<sup>3</sup> for this political phenomenon, meaning that the promises and possibilities were at once theoretically complete and inflated far beyond veracity. Since the Revolution of 1918-19 a free system of government has set all responsibility of government upon the parties, with an immediate and abnormally deflating effect.

In France the freedom of the Chamber of Deputies is hampered

<sup>1</sup> This is exemplified in the Communist parties in various countries and in the Industrial Workers of the World in the United States.

<sup>2</sup> The effect is observable on new and extreme parties like the National Socialist Party of Germany: proximity to office causes them to modify their promises lest betrayal should lose them their following.

<sup>3</sup> Cf. Rehm, *Deutschlands Politische Parteien*.

by the Senate, which is also a popular body, but elected on terms which render it more conservative than the first chamber.<sup>1</sup> Candidates for the Chamber of Deputies, in making their campaigns, deliberately fill their addresses with attractive but impossible promises which they themselves do not believe; they are certain of their rejection by the Senate, which can thus be made to bear the blame for quashing the member's generosity.<sup>2</sup>

One other consequence of the general premiss: certain parties live abnormally unfree lives; they are the parties of extreme dissent and on the margin of seditious associations. Persecuted and mocked, they cannot help becoming bitter, flamboyant, and careless of promises. Only the free can be 'gentlemen'.

The second condition of critical importance is *that strong and nation-wide party organizations shall exist*. This condition is best fulfilled in England, next comes Germany (where Proportional Representation encourages all parties to put up candidates everywhere), then the U.S.A. and far behind, France. The condition has two broad effects. In the first place, each party must carefully measure its words for it may everywhere receive an organized challenge. However difficult it is to overtake a lie, it is possible that it may be overtaken; and experience shows that party agents and workers, apart from their own sense of decency, are very sensitive to the menace of their opponents. We cannot say exactly for how much this counts, but it does count; and, only *certainly* of discovery and widespread divulgence are deterrent. Certainty is only possible where there are parties both ubiquitous and permanent. It is noticeably absent in France,<sup>3</sup> and French observers strongly denounce the evil effects. In some places in the U.S.A., notably the Solid South, where the Democratic Party and the Republican North have exclusive command of politics,<sup>4</sup> this condition also obtains. Impunity is the mother of behaviour which merits punishment. Secondly, when a party organization has been established, and has achieved an illustrious career, it possesses a certain impersonal majesty which compels

<sup>1</sup> Cf. Chap. XVIII, *infra*.

<sup>2</sup> Similarly in the American Congressional system.

<sup>3</sup> In France there is a contest of some kind in almost every constituency, but the contest is not everywhere between representatives of the same parties. Thus in 1928 the Communists put up in 575, the Socialists in 524, the Radical Socialists in 274, the Union Republicans in less than 200 (scattered groups), the Republicans of the Left in 134, the Republican Socialists in 146, Conservatives in 41, constituencies. Besides this there were nearly a score of other groups with the most diverse names and policies, with candidates in from fifty constituencies to only one.

<sup>4</sup> This operates for about 316 constituencies, about 105, counting Kentucky, in the Solid South, and the rest Republican and other Democratic strongholds. The Democratic Party came into power in the South because the Republicans favoured full negro suffrage. Since 1876 the Democrats have been victorious in the eleven Southern States in every National election, their victory being partly due to the transgression of the 14th Amendment: the negroes have been debarred from voting but included in the total figures according to which representatives are apportioned.

the members to accept its ethics. They become careful not to injure the party's name, not to 'let it down'. No party with a long history and wide organization can be entirely devoid of a chapter in its record which is so glorious that it becomes a standard.

We already trench upon the third condition—the extent to which men and women of probity are in politics. This depends upon a number of circumstances which pertain in all countries in different degrees, with the result that for a different combination of reasons the situation greatly varies. The first circumstance is obviously the total number of decent people in the community at large. That is the highest potential. Although countries differ in their psychological composition we should enter too far into the realm of the hypothetical and unprovable to assume any calculable innate differences between them in this respect. We must assume that all countries have a small, but equal, proportion of born truth knowers and tellers. Differences begin to arise as soon as the social composition of the state is reviewed. For the second circumstance already introduces a complication: it is the extent to which they enter into political life. This depends upon the alternative pursuits available and their social prestige, the existence of a respectable tradition in political life, and the existence of independent fortunes. Where alternative pursuits convey distinction men are won away from politics; and the great competitor of politics in the modern world is industry and commerce. People applaud the great organizer and captain of industry; he 'gives work' and raises the standard of living. The competition from this source is strongest in the U.S.A. where the dollar-standard is supreme; it also is very influential but less so in Great Britain; it is even less (but growing more) urgent in Germany, where the imitation of America has become at least a vogue, and, in France, its power is smallest, though not negligible. Both in Germany and France there has been competition greater than in England or the U.S.A. from the existence of a large bureaucracy which, in Germany especially, was the high road to political power, but not of a parliamentary kind. There are other important alternatives like the law, journalism, the Church, teaching; but the conspicuous and rather final one is industry.

Men may be lured away from these pursuits if they think it worth while, and they may think it so if political life is respected. Whether political life confers distinction—and we must remember Ricardo's judgement that all of man's appetites are satiable except the craving for distinction—depends upon the past services of government to the happiness of society, the prestige of the classes who have piloted the craft, and its sheer antiquity. The public is apt to be cynical about the services of government to society: it is least so in Great Britain, most so in France, where the contempt for political life has become

disquieting,<sup>1</sup> while in the U.S.A. hope still battles with justified despair,<sup>2</sup> and in Germany the heart-breaking hopelessness of the Bismarckian era has given way to mingled fear, contempt, and enthusiasm. Both England and Germany have had 'governing classes', which, whatever their selfishness and limited imagination, never fell into the excesses of American 'bosses', or French parliamentarians; they approached their work with the best contemporary culture and conducted themselves decently; nor was their patriotism entirely dedicated to the services of their own class. Then, too, antiquity—the mere continuous span of time during which political institutions have existed without violent destruction and deliberate reconstruction—is powerfully attractive. This occurs in the greatest degree in England, in a lesser degree in other countries. France has suffered several violent changes, the greatest being the break with the *ancien régime*. America has a peculiar newness: for though her institutions are already 150 years old, and derive from a glorious event, her stock has known no stability, wave after wave of immigrants arriving from lands where political liberty was unknown, or cynically travestied. The change of audience is, for the growth of tradition and judgement, as inimical as the change of scene. The monarchy in Germany has fallen; but in the centuries of its operation, though repressive of popular movements and parties, it continuously maintained the doctrine and practice of devotion to 'the State'. During that time some parties co-operated with the Monarchy, and shared its general ideal of good government, while others could not but be critics. Yet the fall of the Monarchy has left the habits of good government almost undisturbed. True, that parliamentarians and the parties are in a disturbed transition period, but there has been a very long and unbroken history of devotion to the public thing.

How far the political life can attract depends, also, upon the existence of independent fortunes, and this, because people will not, and, indeed, cannot, devote themselves entirely to a vocation in which the monetary prizes are few unless they already have a competence, while dependence upon the prizes of office is not conducive to scrupulous honesty with oneself or the electorate. Independent fortunes were and are possessed only by a small number, and they are distributed sporadically, sometimes coincident with civic virtue, but more often not. Until recent years only moneyed citizens could enter politics; they had the monopoly whether they were capable or

<sup>1</sup> Faguet, *Problèmes Politiques du temps présent* (1899); J. Delafosse, *Psychologie du Député* (1898). There have been numerous scandals, for example: The Wilson Scandal, the Panama Case (1892) and the Dreyfus Case arising from the judgement of 1894 and more recently the Oustic Bank affair. Cf. Laviisse, *Histoire de France Contemporaine*, VIII (1875-1914), 129, 163, 193.

<sup>2</sup> See p. 430, *supra*, and, of recent years, the Tea Pot Dome Scandal. Cf. *Hearings before the Senatorial Committee Investigating the Naval Oil Reserve Leases*, Sen. Rep. 794, 68th Congress, 1st, 1924.

not. A very small number of those who were politically able, but poor, could enter politics. But at the turn of the century various associations and trade unions began to make allowances to representatives. Since then the State payment of members has been adopted in most countries, and though this has its disadvantages, the merits are enormous, for it has removed the purely accidental obstacles to the public life. The pay is adequate to maintenance, but not high enough to tempt the acquisitive. Yet a constant guard is necessary to prevent an upward movement. The public is extraordinarily suspicious of increases in the pay of members of parliament.<sup>1</sup>

Next come the conditions which enable good men to overpower the bad in politics. Of chief importance here is the number of *cultured* people interested in the public life, those who act as a forum, if not as participants, and can set the tone of blame and praise. Although the politician may have a contempt for the multitude—though this has its limits, as we have shown—he cannot ignore the vigilant and capable critics, *for no hold upon power in a democratic country is certain*. It is always possible that the foundations of a majority will crack, and attention must constantly be paid to them. Further, it is not the avowedly hostile critics who alone, or in the major part, have an effect: the opinion of friends is a powerful encouragement or discouragement. Now the numbers of such people are small, though increasing; but small as they are, the fact that they may cause a number of voters to change allegiance, has an effect greater than the numbers suggest: the *incalculability* heightens it. Where, as in the U.S.A., the few thousand capable and honest critics are concerned with other pursuits, in business and the law, or, as in France, are disgusted with Parliament and are more interested in the amenities of social intercourse, or, as in Germany before the War, were absorbed in the universities, the Civil Service and the law, and were silent lest they should unchain a *social* revolution, the power of the good over the bad is stultified.

Finally, all these conditions are themselves controlled by the decisive one: the extent to which there is a general interest in the public thing, rather impersonally considered, as an object to be

<sup>1</sup> Payment of Members of Parliament

England . . . . .	£400 p.a., with railway pass.
United States (Federal) . . . . .	\$7,500 p.a., with ample railway and secretarial allowance.
Germany . . . . .	619 marks per month, with railway pass.
Italy . . . . .	15,000 lire p.a.
France . . . . .	60,000 francs p.a.
Norway . . . . .	6,000 kronen p.a.

Usually where pay has been increased—e.g. in France and the United States—the measure has been adopted by a secret vote. Lynn Haines, *Your Congress* (1915), describes how in 1914 ‘the House, in the darkness of the Committee of the whole’ added twenty-cent mileage to the Act of 1907 (which had raised the salary of members from \$5,000 to \$7,500). See p. 15 ff.

developed and preserved for the service of all in the community. This issues from an interest in government rather than in other things, and upon the habit of self-government. It might be called patriotism, were it not for the evil associations of that word. It is state-sense minus partisanship. Some people are less interested than others in the apparatus of government; the French are less interested than the English, as were the Americans until recently. They may show a remarkable enthusiasm for other things, but public administration leaves them cold. An interest in the process of government is bound up with the ability to govern and the continuous spectacle of its good application. The English and the Germans are particularly strong in this art. The Mediterranean peoples seem less capable than the Anglo-Saxon peoples of governing themselves by discussion; they have other great qualities of art and mind; but they seem to have a congenital incapacity for system and daily subordination to strictly regulated duties. This results partly from historical accidents and unfortunate experiences, but it comes partly also from inborn character. Their entire sense of state is small, and their vigilance is not strict. Success or failure in administration does not impress them, as it does the Anglo-Saxons. Oratory has a far greater value as a sheer artistic exercise, with spell-binding power to make the 'worse seem the better truth'. This is one of the fundamental reasons for the defective character of French government: the prestige of the well-spoken word. Not only does interest in the public thing depend upon the general spiritual cast of the people, but it depends upon public report of the actual work accomplished day by day by government. If parliaments, central and local, speak with dignity and sense, if they are proud of their integrity, if they expedite their business in a manner which of itself excites æsthetic approval, if officials act vigorously but politely, helpfully and inexpensively, then a criterion is established which people expect all parties to maintain—even their own. It would not be unjust to say that, other things being equal, where government is bad it tends to get worse, and where it is good it tends to get better.

Now all these conditions determine the extent to which men and women who are able and willing to think and act with objective consideration will enter politics.

These conditions, together with the other two—a long and free political life, and strong and nation-wide party organizations—produce scruples in party politics, and cause the modification of partisanship by objective truth. These conditions affect all party propaganda, but we have already seen that the various methods of propaganda have each their special properties; some appealing more to rationality, others more to the unreflecting expression of the instincts. We have observed also that different countries have these qualities in a different

measure and intensity : and some, lacking one or more qualities, amply make up for the deficiency by their possession of others. England comes out well, in such an analysis ; Germany also ; the U.S.A. rather badly, with good potentialities ; France rather cynically and defiantly goes her own special way, saying, if not doing, the proper thing.

This, then, determines the character of party literature which is, on the whole, better than one might expect from an unqualified consideration of the popular mind in public affairs. We may now return to consider further the means whereby the party 'educates' the electorate, and causes them to become of its persuasion. We have already considered meetings, canvassing and publications ; there remain for analysis Posters, Slogans and Demonstrations ; the Press ; and Social Influence.

**Posters, Slogans and Demonstrations** come mainly at election times, and are designed to beat up enthusiasm, and fire the voters to use their power ; there is little or no intention to 'educate'. The posters contain photographs of local candidates or the leaders of the party, and their common quality is that they usually smile and look benevolently confident. Indeed, of much of this particular period of party activity we may say that it is essentially the Confidence Trick—candidates, literature and posters all say, some in so many words : 'I have confidence in you, now you have confidence in me !' The formulae, in their various languages, 'Vote for X and X will vote for you !' and 'You trusted him once, why not trust him again ?' are very common. Cartoons, that is pictures, usually personifying certain facts and opinions are placarded. If Bread is in question, a Loaf will be pictured as a man or woman and made to tell its own story to the bread-knife ; or a sad-eyed Bullock will explain that it cannot be let into (or out of) the country since the Stile is made of Protective Duties ; or a Money-bag with a head, arms and legs, screams to the corpulent Banker, 'Why don't you let me circulate ?'

They are the simplifications of abstruse problems quintessentially distilled to the point enabling penetration of the average voter's mind. More, they have shed the truth, not only by this simplification, and by the fact that they are set down entirely out of relation to all the other things which are or are not being pictured elsewhere in the country, for they deliberately misrepresent the case against the policy advocated, by distortions of the faces or background, so that the responses are ridicule and hatred, distrust and aggressiveness and the like, and these responses are transferred beyond the immediate stimuli to the party identified with them. Graphs and statistics are used in the same way—they are short truths short of the truth. There is little or no argument, and statements are dogmatic and crispy-clever. The words are few, there may be alliteration, rhyme, rhythm, euphony

and magniloquence, or any other quality of style so long as it is memorable and bewitches the senses ; the content is sometimes defiance, or a promise, scorn or triumph, but it is full of confidence and positive self-feeling and has a savour of Kingdom Come—and when these qualities are present the result is a good Slogan or a Catch-word. One quality alone is not essential—Truth. Nor do its inventors or users themselves understand or believe in it ; enough that they think it an efficient instrument of attraction. The placards are as large as possible, or as numerous as space allows. Effect is sought by posting in prominent places, and reiteration of the best slogan. Now it is clear that, apart from any other quality which will cause the acceptance of the stimulus, the most wide and prominent posting will bring the greatest response. This makes the question of the distribution of space as between parties important, and raises the problem whether there should be statutory regulation. That we treat later in the general consideration of the statutory regulation of the electoral process.

**Press.** We have already treated of the Press as an agency of education, and found that it was strongly partisan. But some newspapers are more strongly partisan than others ; some being plainly the ' organ ' of a party, others being of a party complexion but preserving a certain independence. In France practically all the newspapers are organs of parties or coteries ; in Germany this is also true ; in the U.S.A. the proprietors and editors of the newspapers are party men, but the association between them and the political parties is much looser than in the former two countries, and their policies are more their own than that of the party, a phenomenon due as much to the extraordinary incoherence of American party organization and ' platforms ' as to the deliberate independence of the newspapers. In England some newspapers are indirectly subsidized by the party leaders or organization, but there are powerful newspapers which, though partisan, very often adopt independent lines of criticism. Now in France the Press is partisan almost the whole year round, that is to say, every event and every fact is reported and judged by the particular ideology of the party, so that only a very discerning reader can discover the factual basis of an article. Or, in other words, the allegiance of the voter to his Group is being held and strengthened every day, and the chances of desertion come only with the excitement of the General Election when the actual numerosness of groups and the lack of strong party organization permit alternatives. And this in spite of the fact that party ranks close and orthodoxy becomes stern and querulous as the election approaches. In other countries there is a greater relaxation of party feeling when the most important elections are over and their ' mandates ' analysed, and explained away, though not so much in Germany as in the U.S.A. and England. In these two



countries that part of the Press which is but loosely associated with party organization approaches to a detached judgement of political behaviour, and some alteration in opinion is thereby effected which may come to influence the party leaders and their programme. Within a month before the elections, however, they are back in the fold, proving with the best of reasons why none should be wayward.<sup>1</sup> At election time they do for the party at large what the Whips of the British House of Commons do in Parliament: make sure that the whole power of the party is 'pulled'. However impartial the Press may have been in its freest moments, as the moment of the election approaches it uses the party's fiercest appeals to its prejudices—economic, religious, national or personal.

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This is as much as need be said at this stage about party activity, and we now proceed to assess its significance.

(1) It overcomes the Freedom and Equality of the sovereign voters, integrating them as a local and a national community. Within those communities the value and importance of each voter is not measured nor established by the theory that each equally has one vote, but by the extent of their interest and ability in the work of the community. The stronger and the more capable *take* a more important position, and the rest cannot deny them, because they do not know what to say. The party grows to be a community, with its temples, its priests, prophets, elders, communicants, gospel and liturgy, and the original Rousseauite accumulation of equal Adams and Eves insensibly becomes a graduated society. De Quincey expressed this in his remarkable prophecy.<sup>2</sup>

(2) Party organization gives the electorate the 'education' which other social agencies do not adequately contribute. What does this education really mean? The party is confronted with a mass of citizens who have little information about public affairs, small perception of their meaning, faint interest in them unless they are specially prompted, little understanding, weak faculty of concentrated attention, hardly any leisure to pursue whatever interest they have, and only very vaguely comprehending their own instinctive desires. Party organization operates upon them to procure a victory, and that is attainable only by a concentration of strength. The instrument of this is persuasion, and such persuasion as we see from the actual methods is broadly of two kinds—it is the inculcation of a *point of view* proceeding from those who most consciously hold and are gripped by it, or who can best give it lip-service, and, being directed to temporal affairs,

<sup>1</sup> We have already given an example in the development of the Empire Crusade in Great Britain, by the Press Lords, Rothermere and Beaverbrook.

<sup>2</sup> Cf. *Autobiography* (Edn. Masson), I, 270 (written 1834): 'Then first will be seen a political system truly *organic*—i.e., in which each acts upon all, and all react upon each. . . . ' The whole passage is worth perusal.

it is supported by verifiable *information*. Both of these things are education. The one is the interpretation of fact, the second fact itself. In what measure and to what end do parties give each of these? With all parties, as with any individual, the interpretation of fact is based upon a more or less scientifically thought-out idea of (a) what is desirable in the world, and (b) what is possible in the world, given human nature and the extent of its rigidity or malleability. Let us consider each of these things in turn. Every party has a special conception of the Good—if we use this as a short term representing what is desirable. The service of party in politics regarding the Good is to express and make conscious what is unexpressed and perhaps inexpressible, and but vague and faint, in the mind of voters. When I use the term Good here, I am thinking rather of the ultimate philosophy—the *summum bonum*—of the party which expresses itself in such terms as Individualism or Collectivism, Freedom or Order, Nationalism or Internationalism; it is the immediate issue of what we call ‘character’ in the individual person. All parties appeal to ‘character’ and present a system of values or, as the Germans have it, a *Weltanschauung*. Such a system, however, is rarely developed apart from any particular problem, though a discerning, sophisticated voter could discover it implicit in any considered statement of policy. Other things being equal (and we shall show why they rarely are) the voters do, in time, gravitate to that party whose *Weltanschauung* most fits their own. This statement does not lose sight of the fact that economic interests play a great part in the constitution of modern parties, but these very interests are dictated by an ultimate view that it is right to pursue them to the partial or entire exclusion of other aspects of the Good. The Party in this respect acts as a clarifier, a systematizer, and expounder of doctrine, and marshals together its adherents.

Somewhat similarly with the question of human potentialities: sooner or later in every political discussion there arises the problem, ‘In these circumstances, what will human nature do? And if the results are not what we want, can institutions or education control them?’ The question is of central importance, because a large part of the answer to what is desirable depends upon what is possible. Education largely consists of the adaptation of desires to possibilities, and the expansion of possibilities to the contours of the ideal. Now there is no complete and universally accepted answer to the question. Experience has taught us a great deal, but not everything that it has taught is known or accepted as true by all. Further, experience has not fully evoked all the potentialities of human nature, for every day we see some new manifestation of it in response to new demands. We read into experience what our own character desires to see, and tend to give human nature credit

in accordance with our own temperamental sympathies and antipathies. Each party rests upon such a judgement about human nature ; and parties are divided on this—each having its own belief about its destiny. The ingredients of such beliefs do not for the moment concern us, but we might refer to the most dogmatic of all, the Materialist Conception of History,<sup>1</sup> which has helped the German Socialist Parties and still sustains the Communist Parties.

Facts by themselves have no dynamic value to man : only Meaning, that is, the effect that facts will have, has the power to move him ; and meaning is produced by the joint influence of the Good and the humanly possible. With this parties operate upon the electors. But a medium for its conveyance is necessary and the medium is the body of facts concerning man's contemporary social life. The party educates to a very important degree by displaying these facts, which, as we have seen, other agencies in society fail to do. Moreover, as we shall later show, parties go to a great deal of trouble to gather and systematize facts. However, facts are given, suppressed, glossed over, arranged, under the domination of the particular view of the Good and the Possible held by the party. *There is often plain and conscious dishonesty, in this process, owing to personal pride, unwillingness to admit fault or defeat, desire for personal gain or political success. More often the suppressio veri is simply the result of sheer unconscious bias, and the command of the mind by a dogma which appears to be all truth and morality.*

Now no party pretends to give both sides of a question—except when it especially intends not to do so. It could not sincerely give both sides, each with its due fullness of emotion. Consequently, were the parties never to enter into direct competition with each other, never to meet in printed and spoken argument, never to confront each other in Parliament, or the Press, or in the constituencies, there would be little need for each party to state facts fully, or to examine its own moral and psychological assumptions. The chances of a real education of the electors would be very small. There would be little more than several dogmas circulating in their own orbits, separately.

That is a situation which exists in a varying degree in different countries. It exists in England least ; it exists markedly in the U.S.A. because the two dominant parties have hardly a difference between them, and the Socialist and other really dissenting parties are too small seriously to compete over a sufficiently wide area, or in Congress ; it exists in France because there are *too many voices clamouring in a slightly different key, and because the major opponents do not meet each other everywhere owing to faulty party organization*, while the German loses a little by the multiplicity of parties, but gains by the able organization of the larger among them.

<sup>1</sup> Cf. Eastman, *Marx, Lenin and the Science of Revolution*, London, 1926.

**The Effects of Competition between Parties.** It is the competition of parties which maximizes the voter's education. For one Good is set against another ; what is said to be possible by one is examined, criticized and qualified by an opponent ; and mistakes of fact, conscious or otherwise, are sooner or later corrected.

What limits the educational value of political parties ? We have said that the first law of a party is to win. As far as victory depends upon education, its business is to ingratiate itself with the electors, and consequently most candidates appeal to the electors, not in rational terms of the good, the possible and the true, but deck out what they know of these things in the garb of rhetoric. They appeal, and sometimes cannot help appealing, to emotions which are only remotely concerned with the issue upon which they seek election.<sup>1</sup> *Every party is inclined to, and does, minimize the importance and incidence of the sacrifice which is necessary to the success of its policy.* This is the sometimes unconscious overweighting of what the psychoanalysts call the 'pleasure' over the 'reality' principle : in other words, the tendency to obtain immediate pleasure, or avoid immediate pain, regardless of future cost, which can only be estimated by careful and deliberate calculation. If, for example, it can be proved that municipal amenities will increase, while the rates remain constant or decrease, the candidates will get adherents.

**The 'Swing of the Pendulum.'** This explains better than most other attempts, why the electorate sways backward and forward between the parties from election to election. It is not so much that they are tired of a particular government, or that the party in office is annoying and ostensibly blameable for national misfortunes. It is mainly because power was obtained by the promise of all pleasure and no burdens. Who would vote for a party which promised more burdens than pleasure ? The truth is soon discovered, and the opposition is the only available substitute—and it has the advantage that it cannot be blamed. Further, no majority of electors is ever compact ; it is produced by a conjuncture of different interests, and it soon begins to disintegrate and re-combine.

The mass of voters have less control over the party's presentation of facts than they have over the general direction of purpose of the party : they can comprehend the latter better than the former. Thus the party machine, the leaders and the workers, are pretty independent of the mass of the electorate as far as the facts are concerned, and we have already seen that it is upon certain other factors that veracity has come to depend. In the next chapter we examine recent methods

<sup>1</sup> It is through this medium that the actual mistakes of a party while in power are glossed over when it is likely to be called to account. Further, we have seen that the party wins supporters by its social activities, and thus diminishes the need for rational explanation ; and we shall see that there are other factors operating in this way.

adopted by parties to equip themselves as legislators rather than as electoral belligerents. It is only remotely that the voter compels them to this task.

The education is incomplete, faulty, too often spurious—but how much good is obtained depends upon the mind of the electorate. We have shown that this is ill-prepared. If it were better prepared the parties would be obliged to do more, and if they did more it would be better prepared—thus there is an interdependence between the two: more faults, at present, are latent in the electorate. In the present state of preparation, the mass of voters would be quite headless without parties, and even with them are simply acclimants of the theories and actions of the party leaders and the party workers, not by considered conviction, but by the striking manœuvres of the organization and the candidates. They are obliged to trust a good deal to their estimation of the men who run the party machine. How far, then, do the men count as compared with the doctrine?

**Men and Measures.** There was a time in all countries and all parties when the men counted for much more than the measures, and a famous passage of Burke's attests this. In the days before nation-wide party organization and full responsible government this was natural, for organization means previous concert and responsible government implies solidarity. Where party organization has become strong and responsible government has operated for some generations, the individual candidates lose importance compared with the party and its policy as an indivisible entity. In England, the candidate is of relatively small importance at the present time. Personal distinction in one of its many forms is useful and wins voters—to have done distinguished governmental work, to have written books, to have been a gallant soldier or sailor, or sportsman, or to have money and a pretty wife—all these have their influence. But party lines are strictly drawn, and, providing there is nothing seriously wrong with the candidate—so long as he is not a proven idiot or criminal—he will poll his full party votes. Some special neighbourhood problem may give an opportunity to a candidate's skill as distinguished from his policy; but this is not a frequent factor. Further, about 20 per cent. of the electorate, in some constituencies, it is estimated, have no party habit which attaches them one way or the other. Here the personality of the candidate may bring him victory. But how much is due to the policy, to the candidate or other factors it is difficult to say. In the narration successful candidates magnify their personal part, and the unsuccessful ascribe their failure to the dishonesty of their opponents.

In France, the personality of a candidate counts for more than in England. Experience has not educated the electorate to look for the organizations as the important thing; these, in fact, do not in many cases exist; and the immense importance of oratory, especially in

the rural districts, puts a premium upon the candidate's own qualities. But this is relatively to the English situation. Further, the bargaining which occurs between the first and second ballot causes the issue of a campaign to depend very much upon the personal qualities of the candidates who must appeal not only to the electorate at large but negotiate for compromise between two policies, that with which they commenced, and that which can now win them the support of the voters controlled by the committee of the candidate who has had to drop out.

In the U.S.A. the party organization has the overwhelming importance it has in England, though in some States the partisan system has ceased to have much importance for State elections. The tremendous electoral districts for the Congress make it almost impossible for victory to follow anything but party lines.<sup>1</sup> This dominance of the 'regular ticket' does not rule out the expectations that the member will furnish tit-bits from the 'pork-barrel' for his constituents.

In Germany the advent of Proportional Representation with large electoral districts and party-bound lists has almost entirely destroyed the influence of the candidate, except the one at the head of the 'list'.<sup>2</sup>

In fact, therefore, the man at the head of the party, its acknowledged leader, is a factor of very great importance in the attraction of allegiance. The importance of the local candidate, and even of the party programme, has been for millions of electors entirely overwhelmed by the personality of the leader. The local candidate or the party policy is voted for because the vote will be a vote for Hoover, Al Smith, 'Ramsay', Baldwin, Lloyd George, Brüning, Hitler—and even in France the issues since the War have caused Poincaré, Herriot and Caillaux, and one or two others, to become the ultimate names invoked; all else was mediate. This is easily understandable: such men have shown distinction for many years, and they come to hold positions of great power; their deeds, thoughts, and histories are continuously chronicled, and many people speak of them with admiration or abuse. This makes them much more real than the several hundred fairly new and unimportant members. It is easier, too, to judge character in the simple terms of the Press than it is to master the full purport of a party's programme; and then we must always remember that the average elector has much more personal practice in the broad judgment of character than in the judgment of remote, abstract and complex policies. This phenomenon again takes away from the pure educative effect of party activity, and results in loyalty which cannot be called entirely irrational, since it is founded upon some considered facts, but which gives the word 'representation' a queer meaning.

<sup>1</sup> Cf. the remarks of Lowell, in *Public Opinion and Popular Government*.

<sup>2</sup> Cf. Chap. XIX, *infra*.

The different countries vary in the extent to which a party victory will bring paid offices or other individual pecuniary gain. Such 'spoils' cause men and women to adhere to parties not on account of the leaders and from belief in its principles. Their presence in one or the other party is accidental, having been determined by the habit of the family, who first initiated the novice, or where the larger opportunities are available. The country with 'spoils' on the largest scale is the U.S.A. ; there is some, but not much in comparison with this, in France, and very little in either England or Germany. This is considered at greater length in the chapter on a Closer View of Party.

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**The Rules of Evidence.** It is instructive, having already in mind the nature of party propaganda, to glance at the rules established by Courts of Justice to secure the soundness of evidence.<sup>1</sup> Evidence must be relevant to the issue, it must be the *best* available, and, in default of inaccessible original documents, statutes have provided for the *certification* of copies. Hearsay is strictly confined. Witnesses are asked for facts, not opinions. The parties are confronted, the issue is clearly defined, there is a regular procedure specially directed to obtain the truth, an impartial judge presides and enforces decorum, and controls the steps to secure relevancy, proof and cogency. The ceremonial, the court, the robes, and the oath add to the *solemnity* of the process. What a rough affair is the electoral process compared with this !

**Broadcasting and Politics.** Broadcasting commenced as a casual auxiliary to the more personal process already described. Its importance swiftly increases. Millions of voters in their parlours can be directly reached by the party leaders ! Yet the effect is, on the whole, deleterious. Meetings and canvassing are partially supplanted. *Immediate effectiveness* of appeal tells for more than the truth, for time is short and the attention of listeners easily strained. Qualifying detail is omitted in favour of exciting exaggerations. No personal meeting affects the speaker ; there is no discussion ; the effect of spontaneous interjections is lost. Attention is focused on immediate issues ; the *general* programme is blurred. Worst of all listeners cannot ask questions, make comments, or obtain elucidations. The Government has the enormous advantage of the last word ! Thus we recede from rationality, and approach the complete triumph of the good 'debating-point'. The concentration of power in the party leaders is promoted, since they appeal over the heads of their following, whose critical independence is thereby weakened. Let us remember that this is part of the process by which Cabinets, the supreme governmental directorates, are selected.

<sup>1</sup> Cf. Odgers, *Common Law* (Edn. 3), Chaps. XIX and XX.

## CHAPTER XIV

### A CLOSER VIEW OF PARTY

**THE Central Machine.** The propaganda of political parties is not conducted by the unconcerted activity of the numerous local caucuses, for they have common interests, and not all have the information, money, speakers, and organizing ability adequate to their purpose. It is clear, too, that the central organization is in closer touch with the sources of information—Parliament, the political chiefs, the Stock Exchange, the Government Offices, the Press Agencies and so on; and this proximity means exactness and promptness of reaction, things essential to a campaign. Very broadly, the activities of the central machine, as regards the electorate, comprise—the planning and execution of campaigns, policy-making and the accumulation and distribution of funds.

The planning and execution of a campaign is conducted with more deliberation in England, U.S.A. and Germany, than in France; and it falls into a number of steps well known to close observers of the tactics of central headquarters. First come the settlement of inter-nicine disputes in the constituencies, the counselling of preparedness, and the determination of how many and which constituencies shall be fought. Secondly, is the discovery of an 'issue' which will inflame the public, and put opponents on the defensive and at a disadvantage.<sup>1</sup> Campaign managers are not entirely free in this matter, for they cannot choose except from the more immediate subjects which affect national welfare. Experience has shown the remarkable effect of ingenuity, the best recent examples of this, in England, being the cry of 'Danger' in 1918, 'Free Trade' in 1923, 'Bolshevism' in 1924, and 'Unemployment' in 1929—the last being a particularly good example of a timely and sound choice; in Germany in 1930 'Revision of the Peace Treaties,' 'Strong and Stable Government' and 'Domestic Peace' against the 'Disturbers' (i.e. the extreme elements on the Right and Left); and in the U.S.A. in 1928, 'Prosperity'.

Search for an issue, and its formulation, fall to the leader of the

<sup>1</sup> Cf. Kent, *The Great Game of Politics*, Chap. XLI.



Party in Parliament, the Chairman of the Executive Committee (or its equivalent), the Party Manager or Agent (as in England), or its Secretary (on the Continent), or the especially appointed Campaign Manager in the U.S.A. The connexion between these and the parliamentary leadership in England and on the Continent, is very close, so that the parliamentary leaders have every reason to be fully conscious of their undertakings and mandate. The connexion is not quite so close in the U.S.A.<sup>1</sup> The discovery of the issue is, of course, preceded by careful soundings of the country taken through the medium of the local agents and secretaries, and sometimes circuits are made by the leaders for this purpose. Such circuits are especially necessary in the U.S.A. owing to the enormous size of the country.

A slogan is invented to embody the 'issue'; and Handbooks or Campaign Text Books are prepared, together with leaflets and posters. Since 1924 in England, America, and Germany the radio has become a medium of nation-wide appeal and the presentation of the party's case is of very great importance. Who shall speak and what shall be said is settled by the four or five most important men at the head of the party, and there is always anxiety lest the rank and file get out of hand, and embarrass the parliamentary leaders now, and for the future, with 'unofficial' pledges. Of recent years English parties have begun to pay special attention to placarding, and a sub-committee of the executive, with one or more of the paid officials and a few members co-opted from among the most capable of the rank and file, work out the principles. In the U.S.A. Coolidge's campaign of 1924 was run in accordance with principles laid down by himself, and under his direct authority an Advisory Publicity Board censored every important press, platform and radio utterance.<sup>2</sup> As carefully organized are the German elections.

The central machine also provides, where necessary, the division lists of an opponent who is already a member of the representative assembly. It decides in what parts of the country the support of the chief speakers of the party would be useful, sometimes puts up idiots to entangle the leaders of the opposition, and maps out circuits. It also supplies, free of charge, or at a very small cost, campaign literature to the constituencies.

Important as is the intervention of the central machine in England and the Continent, it is doubly important in the U.S.A., owing to the peculiar manner in which the President is elected. Since the votes of one doubtful state may turn the result, for reasons which we discuss in the chapter on the Executive, at a certain point in the

<sup>1</sup> Cf. discussion in Chapter on the President of the U.S.A.

<sup>2</sup> Sait, *op. cit.*, p. 489 ff. Cf. also, for an account of the campaign, *Political Science Quarterly*, Vol. XL, March, 1925, Supplement.

campaign all the available power of the parties must be concentrated on that state; and the party feeds it with every dollar and device.

**The Programme.** The central machine is not only the energizing and strategic centre of the campaign, it is also the creator of the programme. The centre is under the control of a committee, chosen by delegates to a conference who have been selected by the local caucuses. The various countries have slight variations of this machinery, as have the parties themselves. In England, Germany and France (among the carefully organized parties), the creation of policy is strongly centralized, in spite of the fact that original as well as critical resolutions may be moved at conferences. The short time allowed for the meetings (five or six days at the outside), the necessity of preserving the semblance of a united front, the willingness to trust in the established leaders, the little information possessed by the critics compared with the party officials, and the superior knowledge and wisdom of those leading the opposition or the government in Parliament, and often their arbitrariness in using the procedure of the conference, invariably result in a decisive victory for Headquarters.<sup>1</sup> Their resolutions become the party's policy.

In spite of a long experience of party politics American parties are very defectively organized for the production of a policy, and perhaps this is unavoidable. The National Conventions are vast meetings, crowded with excited holiday-makers, so that business-like debate is impossible. Before discussion in the conventions, the Committee on Resolutions, consisting of one member from each state and town named by the delegations at the convention, formulate the platform after hearing the requests and views of groups who are permitted to appear before it. This is done in a rapid and perfunctory manner. The result is a policy uninformed by mind. It has also this curious feature, that it precedes the selection of the candidate for the Presidency, unless he is, like Roosevelt, Wilson or Coolidge, standing for a second term, and when, finally, he has been selected, he may want the platform altered. The speech of acceptance thus becomes an additional document to be read with the Resolutions, and so on several occasions quite weighty changes have been made in this way.<sup>2</sup> Issues which spring up during the campaign and originate with the candidates or the party press also modify the Platform. The reasons for this comparative inattention to the platform are these: first, that owing to

<sup>1</sup> The causes of oligarchy in the parties is analysed in Robert Michel's *Political Parties* (trans. by E. and C. Paul); and cf. the most recent German edition, *Soziologie der Politischen Parteien* (Leipzig, 1925).

<sup>2</sup> E.g. Merriam, *The American Party System*, p. 234. Cf. H. Clay Frick, *George Harvey, 1864-1928* (1928), and Stephenson, *Nelson W. Aldrich*; cf. also *Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, *passim*.

the separation of powers and checks and balances, American parties are not so plainly responsible for legislation as in England and the Continent, where the leaders of the victorious party find themselves in command of both legislative and executive branches of the government; and, second, that there are no real differences of principle between the two major parties. The result is, that since no party can be sure of effecting its promises or being soundly criticized, no one troubles to make the process of policy-creation a sound one; and rational and careful preparation against attack becomes unnecessary. For these reasons, also, the party need not break into strenuous activity except during the presidential campaign and the intermittent congressional and senatorial elections, and then it considers it enough to *improvise* a platform for immediate effect.

Now party conferences and conventions are demonstrations rather than organizations to think out policy, in spite of the fact that sometimes party conferences achieve success in this sphere. The holding and reporting of conferences must be reckoned among those methods of party demonstration which we have already discussed. Hence the importance of unity in the conference. Where publicity imposes unity it is clear that some other way must be discovered of making terms with dissent before it becomes publicly disagreeable. This is done behind the scenes where the voters are never permitted to penetrate and the report of which they hear only, if at all, in a garbled form, and perhaps from a statesman's biography a generation after the event.<sup>1</sup> The political importance of this secrecy is twofold: (a) it shrouds from the citizen the real source of policies, and (b) it provides the possibility of a *rapprochement* between majority and minority groups, and, by preventing public strife, it prevents the break-up of parties. Policies are then set forth with the imprimatur of that joint anonymity—the Party, or as though they were the personal contribution of the Leader. Once again, then, the mass of voters is deprived of the knowledge without which control becomes an empty term. The prevention of the disintegration of parties is, as we shall see in the chapters on Parliaments and Cabinets, good; but this good can only be obtained by a relegation of certain values and desires to a place far down upon the party programme, and perhaps their utter surrender.

**The Research of Policy.** Now for reasons explained in the previous chapter, when we discussed the limit of party rhetoric, there

<sup>1</sup> Thus with the policies regarding the House of Lords and the political levy (during the Prime Ministership of Baldwin), both of which policies, raised by individual members, were quietly extinguished. The best information is to be obtained from the files of the *Evening Standard* and the *Morning Post*. (Conservative Party Conference, Oct. 8 and 9, 1925, witnessed renewed efforts to alter Law on the Trade Union Political Levy. At the Conference of Oct. 7 and 8, 1927, the Prime Minister was urged not to let the House of Lords question sleep.)

is a tendency for parties to equip themselves not only for propaganda, but for legislation, systematically by research. This has come about best where there is a high level of popular common sense and political experience, and where the parties fight intensely about the application of serious differences of principle. The impulse comes originally from the need to answer sensible questions, and, in proportion as these are put either by the worker or the rank and file of one's own, or the opposing parties, a source of such answers has had to be created. Nor is this all: a party gets a decided advantage when it sets the pace with proposals, shows that it cares for the public welfare, and that it is busily occupied with this when it can put unanswerable posers to the other side; and further, some persons in a party are not satisfied unless all the possibilities of reform are explored by experts. Moreover, in countries where the parliamentary system functions well, with full publicity, a clear sense of responsibility, and a recognition of the importance of organized and continuous opposition, the need arises of putting questions and amendments to the government's proposals, and it is clear that a good reputation can be obtained, and a sense of public duty satisfied, only if the proper means are established to make this possible in the best technical, not partisan, sense. One thing is sought above all by members of every party—to obtain for every move of their own, electoral or parliamentary, the repute that it is *national* in its intention and benefit, not *partisan*; and so fasten upon their opponents the vice of preferring party to nation.

The result has been the establishment, in varying degrees in different countries, of research institutions and schools for candidates and the rank and file. The principal experiments so far have been made in Germany; England comes next; while France and the U.S.A. lag far behind. (In France various organizations, economical and social, outside, but ancillary, to the parties, provide information.) The full importance of this development is appreciable only when two things, which have yet to be discussed, are remembered: first, the plebiscitary nature of modern democratic government, and, secondly, the controlling part played by parties in parliamentary discussion.

The first significant characteristic is that they are centralized—established and managed by the central machine in the capital. The second is that they were commenced by the Socialist Parties, followed at length by the Liberals, and taken up last by the Conservatives, the latter tending to the view that since all that is, is good, and should be preserved, there is no need of research. Broadly, research is conducted continuously by an office organization of several permanent officials, of proven academic capacity, linking up with committees of members of parliament and experts

co-opted for special branches of inquiry ; and it is stimulated, and its results spread, apart from the party's periodical press and handbooks, at occasional schools, usually held at Easter and in Summer.

**Results.** The results of this activity and organization, broadly viewed, are significant. All parties become more advised of the technical possibilities and impossibilities of their policies, and, on subjects susceptible of quantitative statement and discussion, as for example socialization, the organization of certain staple industries, unemployment, social insurance problems, rhetoric and non-rational appeals are pushed far back, and a large measure of agreement can be, and is, reached, before the inevitable clash of ultimate ideals occurs. The result has been to socialize the conservatives and to conservatize the socialists. That this is an advantage there can be no doubt : for parties are but means to ends, and where government can proceed without certain machinery and qualities, it is pure extravagance to have them. To disagree from ignorance is certainly waste, and to outvote a minority for the same reason is a deplorable addition to the necessary sum of human pain.<sup>1</sup>

In the U.S.A. such developments have not occurred. The nearest approach thereto was the establishment of an advisory committee on policies and platform by the Republican Party in 1919. But its report, of large bulk and wide scope, built up by about 200 members, composed mainly of experts of the Republican party outside Congress, was swept away by that imperious and cynical campaign manager, Will Hays.<sup>2</sup> Both Republican and Democratic parties have, of course, a paid office staff, but they have nothing to compare with the research committee and schools of the British parties. The research is the hand-to-mouth research of every political party ; that is, the hasty discovery of rather inexact facts to bolster up an argument of the moment, not the steady application of scientific thought to problems with the view of providing a solution of permanent national benefit. The frame of mind does not exist

<sup>1</sup> In the second place, the central authority is enabled most effectively to dominate the localities. The usefulness and the obvious authority of a research committee overcome local scruples, and cause a flood of gratitude from the plodding home student. Further, at the Schools are people of all ages, but mainly those in the twenties and thirties. For them this spiritual experience is tremendous : they have never known anything like it. The students are avid for the knowledge which they have been prevented by circumstances from obtaining. These few days of speeches by experts and by the great men of the party, discussion on the floor and with fellow-students, in beautiful surroundings, cause the growth of party solidarity and centralization, through gratitude, belief that the information is the correct answer to doubts, and sheer fellow-feeling. This holds good for the large majority of students, and their descent upon their own constituencies after the experience may easily be imagined. A small number become sceptics.

<sup>2</sup> Sait, *op. cit.*, p. 457 ; S. McCune Lindsay, ' *Political Platforms of 1924* ', *Review of Reviews*, LXX (1924), 193.

in the public of the U.S.A., with the exception of the Socialist Party. Outside that party it exists in a number of associations, which do the work which in England has come to be included in the normal functions of a political party. I refer to such organizations, to name but a few, as the National League of Women Voters, the Anti-Saloon League, and the League of Nations Non-Partisan Association, the Women's International League, the National Child Labour Committee. These organizations are propagandist, research and 'pressure' organizations, and concentrate upon Congress, upon the electoral support of one or more specified 'planks' in a platform, and work through candidates and parties who are the more amenable to their purposes. I shall say more about these organizations later in this chapter and in the discussion of Parliaments, but it will be seen that they are outside and independent of parties, and exercise an independent influence upon the electorate. The results of their research are not immediately embodied in party policy, as the results of party research are in England, but the parties are hounded down and driven from pillar to post, until at last they become the vehicles of reforms they themselves have not properly examined. The explanation of this phenomenon, unusual to an English citizen, is considered later.

Parties, through the activity of the central headquarters in the campaign and in the creation of policy, have become strongly centralized; or to put it in another way, the mind of the localities and that of the centre are almost one and the same thing, and the response of the localities to any problem is likely to be the same as that of the centre, even without prompting, of which the means is continually available. This condition is most fully realized in England and Germany; is most mechanical and spasmodic in the U.S.A. and is the least effective in France. The belief in freedom plays a large part in slackening (but to a small extent only) the reins held by the central authority, and therefore in giving opportunities to the local caucuses to act spontaneously; in Germany the method of election (Proportional Representation) and the prevailing belief in order and discipline, contribute to centralization, but the social system which is based upon some real local differences and more legendary ones, slackens central control, at least so far as the State-Berlin relationship is concerned. In the United States of America State politics run on lines different from Federal politics, so that considerable decentralization, sometimes a complete annihilation, of party organization occurs; but it is mechanically centralized because no profound differences of principle cause men to adhere to one machine or the other, and it is spasmodic because victory is more highly regarded than policy, and between elections policy-making demands almost nothing of the organization. This is related with the Congressional

system, which has been partly explained in the chapter on the Separation of Powers, and will be further considered in those on Parliaments, Cabinets and Chiefs of State. In France, for a number of reasons which have already been given, the central authority of parties has been important only on a few outstanding occasions when the country has been deeply moved or involved in difficulties, and in normal times only three parties maintain an almost nation-wide organization supporting a common body of opinion.<sup>1</sup>

**Funds, 'Spoils' and Unpaid Workers.** We have seen how the parties conduct campaigns. They can do little or nothing without a tremendous apparatus of printed material, canvassers and speakers. There is a large party bureaucracy—permanent professional officials, secretaries, organizers and agents, employed at central headquarters or in the locality.<sup>2</sup> This bureaucracy has attained the highest quality and power in Germany and Great Britain. Necessarily, therefore, they need as much money as they can get. There may come a time when paper manufacturers will provide all the paper called for by political parties, when printers will work with the slightest intervals for meals and rest, when speakers will find their own fares, their own information and voice-jubes, free of charge to their party, out of enthusiasm and hope. Some do so now; but while voluntary services are appreciable during the excitement of an election and the imminence of success or failure (particularly so in the parties of attack and progress), the work is too exacting to be done by unpaid workers, even at election times. Then, we have seen, operations are continuous at a level requiring the establishment of a permanent body of officials and the aid of all the instruments of publicity. It is possible to live upon enthusiasm only a short time; a party marches upon its belly.

The problem of party funds has, therefore, always been of importance. There is no way of exactly isolating the effect of money in elections. It cannot be said that so many hundreds of thousands of votes were turned this way or that by an extra expenditure of such and such a sum upon posters, pamphlets, ribbons, party-buttons or speakers. The services of the formal and informal voluntary party workers must be accounted for. We know, however, that party

<sup>1</sup> They are the Communist, the Socialist and Radical-Socialist parties. In the 1928 elections there were 524 Socialist and 274 Radical-Socialist candidates. (See previous chapter.)

<sup>2</sup> In England the agents have their own professional associations, and the association of Liberal agents provides a diploma for those who pass examinations in electoral law and organization. In Germany the party officials are similarly given a special education (cf. Röder, *op. cit.*, p. 46 ff.). Cf. also the *Conservative Agent's Journal*, the *Liberal Agent and Labour Organizer*.

A noteworthy fact (Report, 1929, Conference Labour Party, pp. 287-92) is that 126 of the Labour local agents were partially maintained by the central machine.

managers have a high opinion of the importance of money and its influential products, and we may assume that, other things being equal, the parties gain votes in proportion to the spaciousness and excellence of their publicity, which depends largely on expenditure. That is an article of faith with every election agent, and with the candidates ; a high American party official once declared : ' We have lost continuously because we did not have money enough to present the issues. There is no question about that.'<sup>1</sup> In spite of the fact that much publicity is wasted—posters put in places where they can hardly be seen, pamphlets and declarations thrown away without perusal, canvassing which falls on deaf ears, and speeches which are simply accepted as an entertainment—yet there is a response to stimulation, the response being proportionate to the stimulus ; for the voter has certain self-created defences which need conquest.

Money is therefore of vital importance, and its possession has given the richer classes the power to nullify hostile votes. The advantage has not been entirely overcome by the large amount of voluntary help enjoyed by the parties of the poorer classes, and they also have had to find sources of revenue. The amounts spent are very large, but official figures are obtainable only for Great Britain and the U.S.A. ; the first country spent £1,213,507 in 1929, and the second over 10 million dollars in 1920. Even these figures do not include all that is spent. In Great Britain the amount spent by the central headquarters are not included ; and in America it is admitted that the official figures are far below the true amount.<sup>2</sup> Further there is no reckoning of petty amounts spent by friends.

Money is spent by the local caucuses and the central machine. In the local caucuses it is obtained from the candidate himself and from contributions by the members of the caucus, the rank and file paying a regular but small subscription, while wealthy friends of the candidate give large sums. The central machines also obtain money from the affiliated caucuses, and from various associations, industrial, commercial and social, as well as from private individuals. The Socialist parties in all countries have a more regular and wider circle of contributors owing to their rigid adherence to democratic ideas. They receive publicly acknowledged contributions from their indi-

<sup>1</sup> W. R. Marsh, treasurer of the Democratic national committee, *Hearings before the Sub-Committee of the Senate Committee on Privileges and Elections*, 66th Congress, 2nd Session, I, 532.

<sup>2</sup> Cf. *Return of Election Expenses of May, 1929* (White Paper, No. 114, 1930). The American figures cited refer only to the campaign 'to secure the presidential nomination'. The total includes the expenses of the various committees 'operating in more than one state'. Cf. Sikes, *State and Federal Corrupt Practices Legislation* (1928), pp. 181, 182. Compare also the estimate made by Merriam, *The American Party System* (1922), pp. 334, 335.



vidual members, and affiliated societies, the Trade Unions and the Co-operative movement.<sup>1</sup>

The richer parties have never had to rely upon such means of raising money; they have been able to tap a few large sources. Nor have they, except until recently in the U.S.A., been obliged to divulge the sources of their revenue. In the English Liberal and Conservative parties a small amount comes from the local caucuses paid by duly inscribed members, but by far the largest amount has come and still comes from private contributions. So also in France<sup>2</sup> and Germany.<sup>3</sup>

<sup>1</sup> Cf. *Labour Party Report*, 1929, p. 45:  
1928

	£	s.	d.
Affiliation fees . . . . .	35,414	19	8
Sale of Literature . . . . .	9,597	1	1½
Leicester Co-operative Printing Society (dividends and interest) . . . . .	281	18	1
New Premises Account . . . . .	247	9	8
Advance from 'Bid for Power Fund' . . . . .	12,000	0	0
Miscellaneous . . . . .	112	16	3
Total . . . . .	£57,654	4	9½

[Note.—Trade Unions and Socialist Societies contributed £33,325 10s. 6d. of the total affiliation fees.]

Cf. *Sozial Demokratische Partei Deutschlands, Protokoll*, 1929, p. 49:  
1928

<i>Receipts.</i>		
Advertisements in Party Press . . . . .	22,700,000	marks.
Affiliation fees . . . . .	22,500,000	"
Profits from Printing . . . . .	21,900,000	"
Book trade, etc. . . . .	8,000,000	"
Total . . . . .	75,100,000	marks.

Cf. *Parti Socialiste, Report*, 1921:

1920		
Statutory subscriptions . . . . .	316,091.15	francs.
Other subscriptions . . . . .	44,926.80	"
Various receipts . . . . .	52,876.00	"
Liability fund . . . . .	177,617.05	"
	591,511	francs.

Then there are special collections on occasions of festivity, conferences and anniversaries in the Socialist calendar, members paying what they can. The main features are the small contributions, the steadiness of payment, the division of the funds between the local body and the central machine, and the publicity of sources and expenditure.

<sup>2</sup> Candidates in the richer parties find their own means and there are subsidies from great industrialists. Cf. Pilenco, *Les Mœurs du Suffrage Universel en France (1848-1928)*, Paris, 1930, p. 207. Cf. also Privat, *Les Heures d'André Tardieu, et la crise des partis*.

<sup>3</sup> Consider the example of the German Nationalist Party, almost entirely subsidized by Hugenberg. The connexion between Industry, Finance, Commerce and the parties is very close indeed: not infrequently, a bargain is made between the money power and the party leaders for the inclusion of certain representatives on the party list of candidates.

In the U.S.A. about which there is much more information than in England, because publicity is required, and politicians are frequently indiscreet, the Republican and Democratic parties draw their funds mainly from (1) rich private subscribers—that is, individual persons or business firms; (2) assessments of office holders, and (3) small subscriptions paid with some regularity to the local caucus, or begged at meetings at election-time. We later discuss legislative regulation of party funds.

The sources of revenue, except the small contributions voluntarily paid, have in both England and the U.S.A. given rise to serious criticism in recent years. There are common problems, but each country has its special difficulties.

**Sale of Honours.** The special problem of Great Britain is the sale of Honours to contributors to the party funds.<sup>1</sup> Had there been no war, with its degradation of moral standards, it is very probable that this traffic would have quietly continued until the advent of a Labour Government with a decisive and resolute majority. That titles of honour were sold was well known in the political world of Parliament and the Parties, and the great satirist, Hilaire Belloc, even showed how the thing was done—in *Mr. Clutterbuck's Election*. It frequently occurs that when their real objects require it men will degrade the very thing they profess to value: the Crown was adulated by Conservative and Liberal statesmen, yet they readily sold a most essential part of it, its power to ennoble its subjects, for party gain, and never seemed to question the propriety of this. The War caused a break-up of the old parties and a coalition of ancient enemies. Henchmen of the new leaders acted as whips and party managers. There was a sudden enrichment of the most astute and grasping. The touts could not help making mistakes, and prime ministers were always too busy to purge the lists of improper nominations. The House of Lords was vitally interested in the value of its hold upon the public imagination; and it has never been slow to further the public interest when its own privileges have been threatened. Grave debates ended in a sharp resolution; and the House of Commons followed the stern example. The Royal Commission which was established as the result of this tremendous shudder did not recommend the abolition of titles for political services. It accepted the necessity for such funds,<sup>2</sup> accepted the necessity of reward, and this in the form under criticism, and suggested arrangements to keep the lists pure of any man 'whose antecedents, if properly known, would

<sup>1</sup> Cf. Belloc and C. Chesterton, *The Party System*.

<sup>2</sup> Cf. Royal Commission on Honours, *Report*, Cmd. 1789 (1922), p. 8: 'The existence of party funds is notorious and the necessity for such existence under modern conditions as to the conduct of elections is equally so'; and p. 6: 'The practice of giving honours for purely political service has been continuously followed ever since the growth and development of the Party System of Government.'

have precluded the idea of his being singled out for promotion'.<sup>1</sup> Substantially 'political' honours are still given as before, although greater care is doubtless taken to avoid the ennoblement of the infamous. The Labour Party representative on the commission, Mr. Arthur Henderson, the manager of the party, vigorously dissented from the conclusion of his titled colleagues. He said :

'The system whereby financial assistance rendered to a Party is recognized by the conferment of an honour by the State is, in my judgement, deplorable, and discredits the honours system. It is a means of enabling the temporarily dominant political party to bestow special political power, through membership of the House of Lords, on individuals of their own selection, and it does not secure that the person honoured possesses any distinction except his title.'<sup>2</sup>

The evil is less the increase of a party's power in the House of Lords, than the social one of imposing upon the public, which cannot readily distinguish between virtue and title, and the political one of providing services and money for those who benefit politically through the magnitude of bought propaganda. Without any doubt there would be a diminution of political service if titles were not given—to deny that is to deny that snobbery is a very potent factor in English life. Now there is nothing immoral in subscriptions for the support of a policy considered of benefit to the nation at large. But the traffic in Honours must remain immoral, so long as the general public is deceived into the belief that all recipients are of equal merit, and while the true reason of the honour is not bluntly stated. It has been said that 'money does not smell', but that, surely, depends upon the nostrils.

**Spoils.** The special difficulty of the United States is the 'assessment' of public officials by the political parties. This is a direct offshoot of the 'spoils system'. If paid office is acquired by the exertions of the party, is it not just that the employees should return a percentage of their salary to the benefactor? A regular system of assessments was carried on for decades, but in the Federal Civil Service this was forbidden (not stopped) by the Civil Service Act of 1883.<sup>3</sup> But

<sup>1</sup> A Committee of three Privy Councillors (not members of the Government)—'men of well-known character and position' to be appointed by the Prime Minister for the period of his Government and to scrutinize the Lists as passed up by the Patronage Secretary or Party Manager, and report to the Prime Minister. An adverse report overruled by the Prime Minister to be communicated to His Majesty.

<sup>2</sup> There follows a declaration of faith: 'In a democratic country it is a distinguishing mark of the good citizen that he interests himself according to his opportunity in the well-being of the community. It is indisputable that public service of great value has been rendered by men and women whose thoughts have never dwelt upon titled reward, and in view of the difficulty of keeping the honours list pure, I do not believe that the abolition of political honours would in any way diminish either the volume or quality of the services given to the community by its citizens.'

<sup>3</sup> Cf. Merriam, *The American Party System*, p. 330. The relevant sections of the Act (Laws of 1883, Chap. 27, Sects. 11-15) contain the following passage: 'No Senator or Representative . . . or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no

most State and municipal services are still subject to this system, although, in a few, prohibitory laws have been enacted. The word 'assessment' is used by the reformer: the receiver and payer of the sums call them 'voluntary contributions'. In some cases official situations are openly sold.<sup>1</sup> A general cynicism prevails on the part of the two great parties, and it will be long before reformers are able to root out this deep-seated vice, in which parliamentary and administrative corruption aid and encourage each other's survival.

The common difficulty of both countries, and of Germany and France equally, is that of large contributions made by 'interests'. The trouble arises from the fact that such contributions rouse popular suspicion of the democratic process, provide propaganda which is directed to non-rational judgement, especially when it is used and paid for by people whose economic interests are bound up with the subordination of the masses and the probability that contributions may be made in the hope of influencing a party to give special benefits to a section at the expense of all.

The atmosphere of suspicion and distrust is murkiest in the U.S.A. owing to the immense gulf which separates the theoretical idealism of all from the politicians' cynical use of government for the benefit of 'spoilsmen' and financial interests. The periodical tariff battles, and the continuous attempt to stave off government regulation of, and inquiries into, 'big business', have attracted large fortunes into party funds, and more into the Republican party's coffers than the Democratic, since that party has been 'regular' on these questions. Beard quotes John Wanamaker,<sup>2</sup> the treasurer of the Republican National Committee of 1888, who said to business men: 'How much would you pay for insurance upon your business? If you were confronted with from one year to three years of general depression by a change in our revenue and protective measures affecting our manufactures, wages and good times, what would you pay to be insured for a better year?' The business men paid. In a Senate Investigation Committee of 1892 it was admitted that the Sugar Trust contributed to the funds of *both parties*, regulating its contributions by the size of party votes.<sup>3</sup> Croly, in his *Life of Marcus Alonzo Hanna*, who was Chairman of the National Committee for over sixteen years, gives

clerk or employee of any department, branch or bureau of the executive, judicial, military or naval service of the United States shall directly or indirectly, solicit or receive, or be in any matter concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purposes whatever, from any officer, clerk, or employee of the United States or any department or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the treasury of the United States.' Cf. also *Annual Reports of U.S. Civil Service Commission*, which devote one section to political offences.

<sup>1</sup> Sait, *op. cit.*, p. 506; Brooks, *op. cit.*, p. 339 ff.; Merriam, *op. cit.*, p. 330 ff.; Pollock, *op. cit.*

<sup>2</sup> *American Government and Politics*, 3rd Ed., p. 175.

<sup>3</sup> Stephenson, *Nelson W. Aldrich*, p. 120.

many examples of this kind. The tariff and 'sound money' were the sanctions for universal appeals to banks and industry, and the former were even taxed at one-quarter of one per cent. of their capital. The Standard Oil Company gave a quarter of a million dollars. Enormous sums were raised in 1896, 1900 and 1904: in 1896 it is rumoured that Hanna raised between ten and fifteen million dollars.<sup>1</sup> There is ample evidence that the contributors believed that they were to get a specific return for their money.<sup>2</sup> Towards the end of Hanna's reign and with the advent of Roosevelt a change came over the public conscience: it was part of the general progressive movement and in part due to Roosevelt's own initiative, for he was prepared to accept money from anybody, but not on terms,<sup>3</sup> and he gave the impetus to the passage of the law of 1907 forbidding national corporations to contribute to any election and any corporation from contributing to Federal election campaigns. But, of course, what a corporation is forbidden to do its officers as private individuals may do. Although public opinion now condemns large contributions, and their danger is widely recognized, large total sums of money are still raised in this way, as the figures suggest, but the parties now make a conspicuous exhibition of getting a large number of small sums. Both parties have at various times fixed maxima: the Democrats in 1908, 10,000 dollars,<sup>4</sup> the Republicans in 1916, 1,000 dollars; but in order to bring the total sum up to a useful level, both parties carefully organized 'drives' with paid collectors. Apparently all this apparatus was bothersome compared with its fruits,<sup>5</sup> and the system was abandoned as the chief source of supply. Recent legislation has made for a decrease of suspiciously large contributions: that we consider later.

In England we can only suspect that the great industrial and commercial associations, and the captains of industry, subscribe in much the same spirit as in America, but the motive of special advantage would only operate as a faint hope, owing to the comparatively high standard of English politics, the publicity of English parliamentary procedure, and the absence of that spur to intrigue, a general tariff. For years the Labour Party has demanded the publicity of party accounts, knowing that this could disadvantage only its opponents, and this cry was raised most poignantly during the debates on the 'political levy' clause<sup>6</sup> of the Trade Disputes Act of 1927. It

<sup>1</sup> Dunn, *From Harrison to Harding* (1922), I, 194.

<sup>2</sup> Croly, op. cit., p. 323; and Bishop, *Theodore Roosevelt and His Time* (1920), I, 312.

<sup>3</sup> Bishop, op. cit., I, 329. Cf. Gosnell, op. cit.

<sup>4</sup> *Hearings* (on *Privileges and Elections*, cited above), I, 535, 1568.

<sup>5</sup> Although these were quite large by English standards: between 1916 and 1920, 30,904 contributions were made, averaging a little over 90 dollars.—*Hearings*, I, 1103.

<sup>6</sup> *Trade Disputes and Trade Unions Act, 1927* [17 and 18 Geo. V], (SECTION) 4.—(1) It shall not be lawful to require any member of a trade union to make any contribution to the political fund of a trade union unless he has at some time after the

cannot be expected that such a reform shall eventuate until the Conservative and Liberal parties are powerless, for secrecy of funds is part of their electoral strength, and their publication would without any doubt cause the loss of large blocks of votes as soon as the voters realized who were paying for the posters, pamphlets and speakers.<sup>1</sup>

Workers are obtained for political parties by the prospects of a share in the 'spoils' and by appeals to their sense of self-importance and snobbery as well as by their zeal for the party cause. The term 'spoils', an American addition to political terminology, in its narrow and most usual sense connotes the distribution of governmental paid posts by favouritism and patronage, and not by technical tests of efficiency regardless of political affiliation. But in American minds its sense is widened to cover the 'use of public office' in an illegal manner for personal profit or advantage.<sup>2</sup> It is now mainly an American phenomenon thus summed up by one of the foremost American political scientists: <sup>3</sup>

'Here we find the exploitation of the public by the official, sometimes assuming the most subtle and sinister form of class and personal discrimination, or of open challenge to the fundamentals of law and justice commonly recognized in civilized society, and of these elements arises the force which President Cleveland once characterized in his trenchant phrase as "the cohesive power of public plunder".'

Outside the most benighted of Balkan countries America has had the longest and most vicious experience of this political malpractice, and is still its chief playground.<sup>4</sup> First, then, we should know the extent of offices available for political distribution, and, second, the scope of political perversion of public functions.

From the beginning of the Republic both State and Federal politics

commencement of this Act and before he is first after the thirty-first day of December, nineteen hundred and twenty-seven, required to make a contribution delivered at the head office or some branch office of the trade union, notice in writing in the form set out in the First Schedule to this Act of his willingness to contribute to that fund and has not withdrawn the notice in manner hereinafter provided; and every member of a trade union who has not delivered such a notice as aforesaid, or who, having delivered such a notice, has withdrawn it in manner hereinafter provided, shall be deemed for the purposes of the Trade Union Act, 1913, to be a member who is exempt from the obligation to contribute to the political fund of the union, and references in that Act to a member who is so exempt shall be construed accordingly. . . .

<sup>1</sup> They would ask or be asked by the speakers of other parties, 'Do you believe that Mr. Null or Sir John Cypher cares one damn for *your* interests?' It is a powerful argument.

<sup>2</sup> Merriam, *op. cit.*, p. 103: 'But the term "spoils" may be applied not merely to a patronage or favour system, but to use of public office in an illegal manner for personal profit or advantage.'

<sup>3</sup> *Ibid.*

<sup>4</sup> Both Canada and Australia have similarly suffered, but Australia has gone far to purifying itself (*cf. Report on the Public Services, 1919; and Annual Reports of Public Service Commission*); while Canada is still on trial. *Cf. Dawson, The Civil Service of Canada, 1929.*

were nourished by the use of office as a political reward.<sup>1</sup> But the 'spoils system' on a really grand scale began when Andrew Jackson became President in 1828, his victory having been made by the new states of the West. Then, for various reasons, chief of which were, the wide diffusion of agricultural land and wealth, the self-reliance and equalitarian ideals of a pioneering society, and the lack of geographical or spiritual contact with the culture of the East and spite against the financiers of that section, a fierce belief in the democratic rights of the common man prevailed. De Tocqueville has said of this area and time: 'In this part of the American Continent population has escaped the influence not only of great names and great wealth, but even of the natural aristocracy of knowledge and virtue.' The levelling spirit, and the cynical observation that here was a perfect means to obtain electoral victories and private wealth, conduced to the establishment of the system that all offices should fall to the victorious party. The classic statement of the doctrine and cult which gave the world a new political term was made by one Marcy, a U.S.A. Senator from New York, where the system had reached its most polished perfection: 'The politicians preach what they practise. When they are contending for victory they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful they claim as matter of right the advantages of success. They see nothing wrong in the rule that to the victor belong the spoils of the enemy.'<sup>2</sup> It was not quite in this spirit that Jackson inaugurated the system for the Federation in his first presidential address: he defended his practice on the grounds that the service would be more efficient if there were frequent changes in personnel since long and fixed tenure caused the growth of indifference—a loss not offset by the fruits of experience; and secondly that the rotation of office 'constituted a first principle in the republican creed'.<sup>3</sup> From this time, with the development of universal suffrage, the growth of nation-wide parties, and the expansion of population, the 'spoils system' more and more demoralized the whole of American

<sup>1</sup> C. R. Fish, *The Civil Service and Patronage* (Longmans), 1905; Ostrogorski, op. cit., II, 48 ff., and see MacDonald, *Jacksonian Democracy* (American Nation Series), XV, (1906), and C. J. Bowers, *Party Battles of the Jackson Period*.

<sup>2</sup> Cited in Ostrogorski, op. cit., II, 50, and cf. Fish, op. cit., pp. 156, 157.

<sup>3</sup> 'The duties of all public offices are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience. . . . In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another. Offices were not established to give support to particular men at the public expense. No individual wrong is, therefore, done by removal, since neither appointment to or continuance in office is matter of right. . . . He who is removed has the same means of obtaining a living that are enjoyed by the millions who never held office.'—Jackson's *First Annual Message to Congress*, Dec. 8, 1829, House and Senate Journals, 21st Congr., 1st session.

government and administration : the politician promised office instead of policy, and the administration served the politicians instead of the public. There have been great efforts in the last two generations to root out this cancerous growth,<sup>1</sup> and great success has attended the efforts—but it is a success far from completion.

It is, indeed, a remarkable phenomenon that England and France (but more recently) have escaped the evils that America has suffered. For why should the democratic principle stop short of administration ? Why should it not, as it did in Greece, and for centuries in Rome, go beyond the legislators and affect judges and civil servants ? There has been, in fact, in both England and France, a deliberate denial of the full realization of the democratic theory, and not only a denial, but the assumption of a habit of mind and rule of political behaviour culminating in great self-control on the part of politicians. That self-control is not so strong in France as it is in England, and it is only in its infancy in the U.S.A. But Germany has seen the necessity of learning it and of proclaiming it in her constitution, because she has suddenly turned from the calm paths of bureaucratic government to the turmoil of a party system : ‘ Officials are servants of the whole community, not of any parties ’.<sup>2</sup> It would be missing the essence of modern government, its necessities and its nature, to pass by the deliberate abnegation implied in the setting of administrative and judicial services beyond the bounds of party politics. Its full meaning is discussed, however, in the chapters on the Civil Service.

For a mass of offices this abnegation does not apply in the U.S.A., and the great Plunkitt of Tammany Hall has supplied the reason with irresistible logic : ‘ First, this great and glorious country was built up by political parties ; second, parties can’t work together if their workers don’t get the office when they win ; third, if the parties go to pieces, the government they built up must go to pieces, too ; fourth, then there’ll be the — to pay. Could anything be clearer than that ? Say, honest now ; can you answer *that* argument ? ’<sup>3</sup> The full number is not known, but there are at least 20,000 offices worth over £400 per year in the Federal ‘ spoils ’ alone, and this is as nothing compared with the thousands of State and city ‘ spoils ’.

Combined with the gift of offices is the assessment of their salaries, and that we have already studied. But more pervasive and mortal in effect is the partisan perversion of law and administration. We need not pursue this in detail, for American students have themselves sufficiently analysed the system.<sup>4</sup> Its broad features are : (1) the discriminative use of public moneys for civic improvements, where

<sup>1</sup> See Part VII on the Civil Service, *infra*.

<sup>2</sup> Art. 130, Constitution, 1919.

<sup>3</sup> W. L. Riordan, *George Washington Plunkitt*, p. 24 ff.

<sup>4</sup> See Merriam, *op. cit.* ; Sait, *op. cit.*, p. 357 ff. ; Kent, *op. cit.*



the pliancy of localities and individuals determines the channels of expenditure—this is termed dividing out the ‘pork barrel’; (2) the corrupt use of legislative power, which is used or withheld to benefit or injure according to the needs of the party followers, and not of the nation; (3) partisan interpretation of the laws in administrative practice—as, for example, building regulations, a fruitful source of extortion; (4) plain theft of money by false accounting, and venality in public contracts of sale, purchase and construction, and hiring out public property in the form of franchises, a part of the proceeds for the ‘boss’ and the ‘workers’, another part for party purposes; (5) pressure in the lower courts of justice; (6) connivance at police corruption by criminals of all kinds from murderers, keepers of saloons and brothels, to cheats by weights and measures.<sup>1</sup>

Against this gigantic feature of American party life what has poor Europe to show? Administrative partisanship is, on the whole, negligible. In England the only paid offices are a very few in the administrative service, postmen and some minor municipal offices. All these are insufficient to reward the small circle even of the most zealous party workers: moreover, the standards are all against the use of office as party currency, so that patronage is dispensed shamefacedly. In France there is rather more party patronage than in England, the Prefects and many local officials being subject to ‘spoils’, while recruitment and promotion in some of the central offices are rather badly tinged with party colour. Further, the grant of tobacco licences and other small governmental favours are influenced by political affiliations. Germany has almost entirely rooted out ‘spoils’, only to confront its danger since the Revolution of 1919.

Why is there this great difference between the U.S.A. and the other countries? There are many reasons, and the great demands made upon a party system which has to produce some co-ordination among so many authorities in a Federal system occupying a continent is only one. Certain psychogenic factors stand out. The first is the idea, widely rife, that it is proper to acquire everything the purchase of which can be afforded or which is obtainable by exploiting somebody or something. There are many people of that kind in other countries, but not so many as in America; and if a cause of this difference must be given the best is that in the U.S.A. millions of poor, oppressed, and ignorant people suddenly fell upon a tremendously rich land. We expect the starved to become gluttons, especially when they live in a free land. A thoroughly predacious culture was created. It is considered highly laudable in America to ‘get by’—that is to beat the competitor, or acquire a commodity, by personal effort, no matter what the moral quality of the process. Secondly, the never-ceasing waves of immigration brought a succession of people

<sup>1</sup> Cf. Merriam, *Chicago* (1929).

from lands where political authority is oppressive and where the only known ways of circumvention and propitiation are purchase, guile and violence. They will never boldly and plainly assert a right granted them by the law, but always seek extra-legal intermediaries who are believed to have influence. Fear of repatriation has much to do with this in the first generation.

Next, the U.S.A. has, through a hypertrophy of the democratic theory, a tremendous number of elective offices—a matter we have already indicated—and this inevitably leads to two things—the parties have got more grist and are more indispensable than elsewhere. Lastly, there is not yet a wide enough intellectual participation in government insistent upon excellent administration—people are too occupied with other things. It is making a gradual appearance.

**Statutory Limits.** Candidates and the organizing parties are so anxious to win that, especially in the heat of an election, they tend to lose all hold of sedulously established standards, they confuse the public good with their own policy, and feel that with their own victory is bound up every just solution of the problems of government. Moreover, many do not possess nice scruples about the roads to office. Consequently, the law has stepped in to purify the electoral process. It is significant that intervention began in a serious measure only after parties had developed a nation-wide organization and had begun to face each other as substantial and responsible rivals. Not until 1883 was there a comprehensive and stringent law passed on this subject in Great Britain; not until after 1890 in the U.S.A., while in France and Germany legislation is very recent.

In Great Britain,<sup>1</sup> the Corrupt and Illegal Practices Act of 1883 codified and added to the piecemeal legislation of previous centuries, making a code of admirable strictness. Corrupt practices include (1) *Bribery* by gift, loan or promise of money or money's worth to vote or abstain from voting; by offer or promise of a situation or employment to a voter or any one connected with him, by giving or paying money for the purpose of bribery, by gift or promise to a third person to procure a vote, or payment for loss of time, wages or travelling expenses to secure a vote; and the consequences are the same whether bribery is committed before, during or after an election. (2) *Treating*, which means the provision or payment for any person, of meat, drink, entertainment or provision, at any time, in order to induce him or any other person to vote or abstain from voting—and such extends to the wives or relatives of voters. (3) *Undue influence*, i.e., the making use, or the threatening to make use of any force, violence or restraint, or inflicting or threatening to inflict any

<sup>1</sup> Cf. Rogers on *Elections*, 3 vols., 1928; II (20th Ed.), *Parliamentary Elections and Petitions*, passim; III (19th Ed.), *Municipal and Other Elections and Petitions*, passim.

temporal or spiritual injury on any person in order to influence his vote, or by duress or fraud impeding the free exercise of the franchise by any man. (4) *Personation*, applying for a ballot paper in the name of another person, whether alive or dead, voting twice at the same election, aiding or abetting personation, forging or counterfeiting a ballot paper. (5) *Unauthorized expenditure*. That expenditure which is not authorized in writing by the election agent.

Illegal practices include paid conveyancing, advertising, and hiring, without authority, committee rooms; voting without qualification; false statements made about candidates; disturbance of public meetings between the issue of an election writ and the return of the election; printing, publishing or posting any bill, placard or poster not bearing on its face the name and address of the printer and publisher; illegal proxy voting. Heavy fines and withdrawal of the right to vote or be a candidate are attached to these offences.

The expenses of the candidates were limited by the Act of 1883 and now, after the passage of the Reform Acts of 1918 and 1928, stand at 5*d.* per elector in a borough constituency and 6*d.* per elector in a county constituency.

In practice there is little corruption of a serious nature at election times. But neither law nor custom have stopped the practice of 'nursing' a constituency, that is, of treating in the form of entertainments, excursions, municipal gifts, and so on, from the time of 'prospective' candidacy until the election period, as legally defined, has commenced. This practice still causes a non-rational bias in the election results and in party membership. Further, there is no easy means of inspecting whether the agents' returns are a true account of all that has been spent. A constituency is a large place and it is difficult for either the state or opposing parties to appoint officers who can light upon anything short of flagrant cheating. Nor are the parties as severe with each other as theoretical reasoning would teach, for though upon proof of charge, the reward is the gift of the seat to the opponent, a denouncer risks unpopularity, and it may be considered as an unsportsmanlike attempt to evade the judgement of the electorate; and mutual tolerance on such matters is not seldom preferred by party agents. At any moment some workers may do an unwise and unauthorized thing and bring the law upon his organization.

The main evil from which British elections now suffer is the unfair contribution of motor-cars and the occasional payment of party workers. Motor-cars are lent by friends to candidates and they appreciably benefit the rich candidates.<sup>1</sup>

Then there is the pressure which is not sufficiently perceptible or

<sup>1</sup> Cf. the discussions of this subject in debates on the Electoral Reform Bill, 1931, *Parliamentary Debates*.

fixable for prosecution. Tradesmen are intimidated into putting posters into windows—but who can litigate upon a smile, a wink or a gesture? Agricultural workers, in particular, have not yet lost all fear of being dismissed from their jobs if they do not vote right. Canvassers of rural constituencies are full of anecdotes of these effective relics of feudalism, and everywhere the system of large estates and agriculture hired labour is accompanied by moral conservatism. A final point. There is no penalty for the use at elections of the Union Jack on posters or unfurled over vans and speaking platforms. In France, neither white nor tricoloured paper may be used for placards—because the former is reserved for official communications and the latter is the official colour of the Republic!<sup>1</sup>

The provisions of French law relating to electoral procedure are not vitally different from the English. The first serious attempt at statutory regulation of electoral behaviour came with the Organic Decree of 2 February, 1852, on the Election of Deputies to the Legislative Body, a decree following close upon the establishment of universal suffrage and Louis Napoleon's *coup d'état*. Until that time a few dispositions of the penal law served to throw into relief the normal custom of electoral corruption; it could do little more, for the governments which managed France for the constitutional monarchy were themselves the supreme corruptors, their success being quite assured by the paucity of the electorate, and the firm centralized grip over local administration.<sup>2</sup> Nor have the governments of the Third Republic been at pains to divest themselves of the electoral succour obtainable from the local officials—the prefects and the mayors in particular. In the early years of the Republic, the pressure of the government on the prefects and the prefects on their subordinates was enormous. 'Neutrality', said one Prefect in a declaration to his staff, 'is hostility which attempts to hide. As for me, I cannot be duped that way. I shall unmask it when I come across it, and mete out justice every time I can.'<sup>3</sup> Governmental pressure still persists, especially in the constituency of a Minister, and through the practice of the distribution of administrative favours, like grants-in-aid, *via* favoured candidates and members; but, on the whole, the amount and intensity of governmental pressure is now quite small. It is clear from contested elections that much petty corruption still occurs, the main forms being an increase, promised or actual, or withdrawal of, poor relief, considerable intimidation of leaseholders and labourers in agricultural areas, banquets held between the two ballots,

<sup>1</sup> See Pierre, *Traité de Droit Politique et Parlementaire*, Vol. I and Supplements, 1919 and 1924, Chap. IX, *Des Crimes et Délits Électorales*, and the full text in Duguit et Monnier, *Les Constitutions et les Principales Lois Politiques de la France*, p. 280 ff.

<sup>2</sup> Weil, *Les Élections Législatives depuis 1789* (Paris, 1895), gives a good though brief account of the development of French electoral law and manners.

<sup>3</sup> *Ibid.*, p. 231.

food and drink given to electors who come from far away, small gifts of money, drinks on a large scale (the French form of canvassing) promises to bestow upon the constituency the whole or part of the parliamentary salary, threats to stop a pension, and in some constituencies, systematic distributions of goods and money. The laws of 30 March, 1902, of 29 July, 1913, and 31 March, 1914, extend the scope and detail of the previous rules and make the penalties much more severe. But organized ecclesiastical pressure, very powerful in the rural districts, has not been overcome. The electors themselves are in many places always on sale. They enjoy the turbulence of the campaign, and are imposed upon by pageants.<sup>1</sup>

Two innovations designed to produce equality of opportunity among candidates and to reduce election expenses were passed, one before and one just after the War.

The law of 20 March, 1914, regulates placarding, and that of 1919 the free postage of circulars.

The reasons leading to the laws on placarding were: to stop candidates from swamping each other's posters by over-posting and destruction, a practice which the law had attempted to regulate without success; to reduce electoral corruption by means of excessive payments to bill-posters; to reduce expenditure generally; and to reduce the bought competition which poorer candidates must face, this, the egalitarian motive, being the strongest. On the whole, candidates for the French Chambers are poor men, they do not and cannot usually spend much on an election campaign, a large number are outside the parties which can afford to give help, hence the importance attached to equality. The administrative circular accompanying the text of the law runs: <sup>2</sup>

'It (the law) proposes, by reducing electoral expenditure, to equalize as much as possible the means of propaganda which the different candidates may have at their disposition, in the course of the same electoral campaign and in the same constituency, and to prevent the wealthier from benefiting over their rivals by material advantages which hitherto have placed the poorer candidates in an unfavourable position. The legislator desires that, in placarding, the contest shall take place with equal weapons.'

The law applies to all elections—for the Chamber of Deputies, the Senate, local government bodies. No posters may, during the electoral period, be placarded anywhere excepting on special places reserved therefor by the municipal authorities. On each of these boards, each candidate, or list of candidates, receives an equal surface. In order that there may be a proper distribution of boards through the constituency their number is regulated according to the size of the commune. A minimum of five in communes of 500 and less is

<sup>1</sup> Cf. A. Pilenco, *Les Mœurs du Suffrage Universel*, Bk. II, Chap. I.

<sup>2</sup> 21 March 1914; Pierre, III, 288 footnote.

prescribed, and then the number rises degressively as the communes increase in size. There is a categorical prohibition on placarding otherwise, even when it pretends to be an industrial or commercial advertisement, or a letter addressed by a candidate to one of his supporters. How careful legislators must be is shown by an amendment which the Senate made to the bill presented by the Chamber. The Chamber provided for 'special sites and an equal surface . . . to each candidate'. But this could mean each candidate or list being given a site, so long as the area was equal, but in different places in the constituency—some prominent, others unfrequented.<sup>1</sup> Hence the Senate's amendment whereby posters appear equally on each and the *same* site. There is this advantage to the electors, that a comparative study is thus possible and, however little this is, the statesman cannot despise small mercies. No single reform ever yields very much.

The law of 25 October, 1919, provisionally regulated the distribution of circulars or election addresses and ballot papers, and it was made permanent by that of the 21 March, 1924. This law was the result of a confused struggle to secure a diminution of candidates' expenses, and, if possible, to cause the State to take over some part thereof. A bill of July, 1912, voted by the Chamber, had even transferred to the state the printing and distribution of ballot papers and one election address for each elector. But the Senate killed the proposal. The project was taken up again in 1919,<sup>2</sup> but was reduced to that of a sharing of expense between candidates (each to pay a flat rate) and the State. The law finally arranged for a kind of co-operative printing of ballot papers and one circular per candidate; management is by a committee composed of the candidates (or their agents), presided over by the president of the civil court, and helped by postal directors and judicial official. Envelopes are provided by the Prefect's office; two ballot papers and one circular of limited size are posted and distributed free of charge. The commission then charges the candidates with their share of the cost. The benefit of this law is simply to reduce costs by the cheaper price of joint printing, and the free distribution. But outside this, the candidates may spend as much as they like on their candidature. In fact, the restrictions on placarding, and the saving of money on postage, have simply given rise to more expenditure upon circulars and meetings. (In England every candidate may send one electoral communication to every elector free of postal charge.)

<sup>1</sup> See Rapport, *Groussier*, 9 March 1914, *Chambre des Députés*, and Bérard, rapporteur in the Senate (Senate, 5 March 1914): 'All boards reserved for candidates must be side by side, in order that the electors may compare their "professions of faith". It would be arbitrary, unjust and disloyal to be able to sacrifice one candidate to any other by the location of the hoarding sites.'

<sup>2</sup> Law of 12 July 1919 (though without the original clause).

U.S.A. The law relating to electoral purity in the U.S.A. falls into the two divisions of Federal and State regulation. The Federal authority has no jurisdiction excepting over electoral organizations which cover more than one State. Thus State and municipal elections are outside Federal, and only within State jurisdiction. Where possible it has been attempted to prevent any mutually destructive legislation, though careful scientific co-ordination has been no more than occasionally mooted.

Federal Law is now summed up in the Federal Corrupt Practice Act of 1925,<sup>1</sup> which codified and expanded acts passed in 1907, 1909, 1910, 1911 and 1918. Before 1907<sup>2</sup> the only law treating of corrupt practices was the Civil Service Act of 1883, which regulated political assessments, and several other incidents of the spoils system.

The broad features of Federal regulation are :

(1) National banks and corporations organized by Federal Law may not contribute money in connexion with elections to any political office ; nor may *any* corporation contribute money for elections of the Federal legislature and executive. Penalties of fines and imprisonment are established.<sup>3</sup>

(2) All contributions and disbursements made to influence elections of representatives to Congress must be publicly declared. The treasurer of a political committee receiving and spending money must file accounts *before* and *after* the election. The original law of 1910<sup>4</sup> enacted only a declaration within thirty days *after* the election, but this was to make any but the most corrupt receipts and expenditures of no effect in revolting public opinion, for between one election and another the public is notoriously forgetful. The law originally affected only political committees ; or, other than these, persons, firms, associations or committees spending fifty dollars or more ; but not *candidates*. Thus candidates' expenditures were not regulated. Further, expenses for travel, stationery, postage, writing,

<sup>1</sup> Postal Salary Increase Act, Title III, *Federal Statutes Annotated, Supp. Pamphlet*, April, 1925.

<sup>2</sup> It should be noticed that in 1907 (Congressional Record, 3 Dec., p. 78) Roosevelt made a suggestion on the line of French parliamentary opinion we have already noted—'The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties. An appropriation ample enough to meet the necessity for thorough organization and machinery, which require a large expenditure of money. Then the stipulation could be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or donor ; and the necessary publicity for receipts and expenditure could without difficulty be provided.'

<sup>3</sup> By the Law of 1907 (*U.S. Statutes at Large*, 34, 814) corporations became liable to a fine not exceeding 5,000 dollars ; any officer or director consenting to the contribution could be fined not in excess of 1,000 dollars, or imprisoned for one year (maximum), or sustain both penalties. Cf. Sikes, *State and Federal Corrupt-Practices Legislation*, Durham, N. Car., 1928, pp. 191, 192.

<sup>4</sup> *26 Statutes at Large*, 822.

printing and distributing letters, circulars and postcards and for telegraph and telephone service were exempted. A very large amount is spent on these items, and if the intention of the Act was to limit expenditures, this clause provided an opportunity of evasion by dishonest classification and diversion of expenditure. In 1911 the law was made applicable to the receipt and expenditure of money by the candidate, and by limitation of the amount which might be spent. Further, it was enacted that both treasurers and candidates were to file their statements of *expenses* before as well as after elections. The upward limit of a candidate's expenditure was put at 5,000 dollars for 'nomination and election' for Representatives, and 10,000 dollars for Senators. But personal expenses and expenses on objects previously exempted were not to be reckoned.

(3) In 1911 and 1918 the law was directed against the promise of office, money, or 'anything of value' in consideration of votes or abstentions in elections. The filed declaration was to include whether or not promises of appointment had been made.

(4) The Act of 1925 caused the law to cease to apply to primaries or conventions.<sup>1</sup> It only applies to general elections. Expense statements have to be made three times at intervals of five days before the day of election, and also after the day of election, within a period of thirty days.

Oaths or affirmations were to attest the honesty of the statements, an attempt thus being made, as in so many proceedings

<sup>1</sup> The constitutionality of the law as applicable to primaries and conventions arose in the famous case of *Newberry v. United States* (1921), 216 U.S. 232, in which five judges against four maintained that *primaries and conventions were not elections in the sense of the Constitution*. Newberry had conducted a primary campaign in Michigan for nomination as U.S. Senator. The Michigan electoral law, applicable by the clause in the Federal Statute, running: 'No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use or promise, or cause to be given, contributed, expended, used or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend or promise under the laws of the state in which resides . . . '—allowed an expenditure of one-quarter the annual salary of a Senator, that is 1,875 dollars. It was proved that 195,000 dollars had been spent in the campaign.

Justice McKenna sided with the majority not on the grounds that primaries are not elections within the sense of Art. I, 4 of the Constitution, but that in 1911 when the Act was passed the Congress had no power over senatorial primaries, but reserved the question whether it would have had if the Act were passed after the ratification of the 17th Amendment (1913) making the Senator subject to direct election by the people.

This is a queer case of judicial casuistry.

Justice McReynolds (majority) held that 'If it be practically true that under present conditions a designated candidate is necessary for an election (*then recollecting himself*)—a preliminary thereto—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis. . . .'



of State, to secure the truth by a special, if not a supernatural, solemnity.<sup>1</sup>

How have these laws worked? Let us consider, first, the group of rules designed to obtain publicity, for these seem to be the principal contributions of American law and experience to democratic government. Statements are filed and sworn to, as required. Not to do this is too obvious a breach of the law. Other committees, not political, yet affected by the law, are sometimes recalcitrant, owing partly to ignorance and partly to their alleged honest belief that they are not affected. Thus, for example, the great champion of obedience to law, the Anti-Saloon League, did not in 1920 file its statement.<sup>2</sup>

To have filed a statement is, however, not necessarily to have told the truth. For a clear disclosure one needs either a vehicle of publicity which travels everywhere like the Press, or some special officer to examine the accounts; and, in any case, an appropriate form of accounts to reveal and not mask the true facts. None of these requirements exists. For clerks of Congress merely receive the statements and file them away—they are not prosecuting officers. Nor have the opposing parties a real incentive to candour and challenge, for they do not, as in England, automatically obtain the contested seat if the guilty party loses it. It is not required that the Press shall have all the accounts; and journalists only dive into them in order to bring up enough mud to sully their rivals. Neither government nor citizens have arranged to let daylight into the accounts, collectively and comparatively. And, if they did, the rays would fall upon a maze and tangle of figures impossible of interpretation. We have already shown that the State can only succeed if it follows the technique of the particular thing it seeks to regulate; and, in particular, we remarked that a vital part of the German Works Councils Act of 1920 was rendered null by the failure to prescribe a form of accounting which should make Balance Sheets revelatory.

<sup>1</sup> Indeed if their electoral and parliamentary eloquence is any index to the state of mind of an American politician, their oaths must have been as awful in effect as round in substance. For no politicians in the world have God upon their lips as often as the Americans.

<sup>2</sup> Law of 1910: 'The term political committee under the provision of this Act shall include the national committees of all political parties and the national congressional campaign committees of all political parties, and all committees, associations or organizations which shall in two or more States influence the result of an election at which Representatives in Congress are to be elected.'

The decision of the Supreme Court (*In re Anti-Saloon League of New York*, 198 N.Y. Supp. 605, 1923) was as follows: 'Many activities in connexion with elections are educational, but their motive is to effect the result, and to aid or defeat candidates or propositions submitted for a decision by the ballot-box. When money is received for such purposes, the law requires publicity to disclose its source and amount, and to test the sincerity for the public good of the means and propaganda employed. The law is predicated upon the truth that publicity will never hurt a good cause, and has destroyed many bad ones.'

This the government of the U.S.A. have neglected to do ; and perhaps it cannot be done with entire efficiency. The result, then, is a mass of items with figures which no one can fully understand, and which therefore are encouragements to lies. The best authority on this subject, after an extensive first-hand investigation, says : ' The accounts are worse for some years than for others, but in no year do they measure up to even low standards ; and therefore to a considerable extent they defeat the very purpose of the law.' <sup>1</sup> Further, when ' receipts ', like the benefit of a page in a newspaper, or expenses of printing, are contributed by apparent outsiders, these are not indicated.

No accounting at all is required for expenses in the period between elections. This is similar to the law in all other countries, and it shows that the law has not yet overtaken political practice. A crafty means of evading the law has been discovered in the practice of overspending the amount received, so that there is a deficit. The deficit is afterwards covered by undisclosed contributions. Lastly, the amounts spent by the state and county committees are not filed, so that a vast amount of expenditure is not regulated and published by the Federal authority, although it would seem to have the power to do so.<sup>2</sup>

All in all, the statutes have failed to have an appreciable effect upon American practice. There is neither restraint in expenditure nor truth in the statement of its sources and destination. Such laws may make politicians either reform or hide ; and American politicians have preferred to hide. Yet there is some restraint, and the spirit of the law establishes a standard, and the notion that there ought to be a standard, and this is not without value. The spirit of partisanship is stronger than the sense of state ; and the vast apparatus of party requires an extent and quality of supervision to which American citizens have not yet awakened in sufficient numbers.

The states have a longer history of continuous occupation with electoral corruption, and many have gone along paths quite unfrequented by European nations in their attempts to purify electoral operations, not that they are anywhere more effective than in the Federation.<sup>3</sup>

(1) Publicity of accounts before and after election is adopted in many states. But in some there are no official forms ; where they exist they are sometimes not drawn with adequate detail ; in other

<sup>1</sup> Pollock, *Party Campaign Funds*, New York and London, 1926, p. 190.

<sup>2</sup> Cf. *ibid.*, p. 218, footnote, for cases cited. Since in the solid South the elections are uncontested by Republicans the important expenditures are those not on the general elections but on the primary elections ; therefore, the primary election expenditure being unregulated, the election expenditure in the Southern States is unregulated.

<sup>3</sup> Sikes, *op. cit.*, *passim*.

places, as in Maine, they begin to become revelatory by their classification or the attempt to differentiate clearly between ante-election and post-election declarations by coloured papers; as in West Virginia.

(2) The filing of statements is confined to a period not too long before the election, and New Jersey forbids the receipt of contributions later than five days before the election, when people are so excited that publicity of accounts loses effectiveness. In some states the declarations become part of the permanent records, in others they are held for as long as four years. As to the effectiveness of these provisions the story must needs take a sad turn. A very large proportion of returns are filed (Pollock says, 85 per cent.); but their untruthfulness is shocking, and can only with difficulty be reconciled with the commandments taught in the great moral institutions like the Y.M.C.A., the Methodist, Baptist and Wesleyan Churches, to which so many American citizens belong. Pollock's judgement<sup>1</sup> is conveyed in a string of condemnatory phrases: 'four-fifths perjury', 'carefully sophisticated, and income tax evaders have no monopoly in juggling figures'—'a travesty on the word publicity to say that the statements serve to inform the public'—'vague and uninforming'—'the word "organization" covers a multitude of sins'—'"services" is simply indispensable, and "advertising" sometimes means "speaking"'.

(3) States have, therefore, been compelled to go further. Some have public officials to review the accounts and report delinquents. Some have gone even further. Georgia and New Hampshire require publication by the candidate in two newspapers of general circulation in the state as well as the usual filing. In Montana, Nevada and Oregon the accounts are marshalled in the annual report of the Secretary of State. In Nevada and Oregon parties and candidates must hold their accounts open for public inspection, and must notify rival candidates and parties of their revenue and expenditure. Such means of pressure upon contestants are of greater efficacy: for though the tendency is to hide, it is easier to hide from a public officer than from a rival in one's own trade. The only obstacle is that a 'truce of God' between rivals of equal villainy may defeat the law. Yet there is the certain gain that the law gives the more honest candidates a weapon which costs them nothing, and which may win them a good deal if they are vigilant.

<sup>1</sup> Op. cit., p. 240 ff. Cf. Sikes, op. cit., Chap. V: 'In trying to reach an answer to this question inquiry was made of the attorney-general of each of the states if he thought such laws had proved themselves efficacious in his state. Thirty-six replies were received. The answer in all but five cases was that these laws had produced good results and had done much toward the elimination of undesirable practices in connexion with elections' (p. 145). Note pp. 146, 147, in which the author expresses unfavourable opinions regarding the value of the laws.

(4) Limitation on expenditure is very common, but is evaded (a usual limitation is by percentage of the amount of yearly salary to be obtained from the office, a sum often quite inadequate, for a state-wide election).<sup>1</sup> Friends of a candidate spend what he is not permitted to ; the exempted objects of expenditure are precisely those upon which much can be spent ; if no single contribution of more than 1,000 dollars is permitted (as in Nebraska), then it is easy to ascribe part of the bigger subscription to any name taken at random.<sup>2</sup> The politicians are merely embarrassed for a time. Nor is this all. American experience has shown that limitation of the total spent is not so effective as limitations of expenditure on special items which are deemed improper. The success of this, however, depends on the practical ease of detection, and upon the difficulty of proper audit where money spent upon one object is wrongly classified.

(5) Several states forbid expenditure on election day. North Dakota even forbids electioneering on that day.<sup>3</sup>

(6) The sources of campaign funds are restricted : corporations being forbidden to contribute, and assessments of public officials are prohibited. Further, careful distinctions are drawn between political and other committees and their respective rights clearly stated. The intention is to reduce the agencies of expenditure and propaganda and thus concentrate responsibility.<sup>4</sup>

(7) A general requirement is that all political advertisements must be plainly distinguished by some such legend as ' Paid advertisement ', with a statement of the cost, the name of the candidate, and those authorizing the advertisement, and the name of its author.<sup>5</sup> News-

<sup>1</sup> Cf. Sait, *op. cit.*, p. 516, e.g. *Oregon* : Governor's Salary = 7,500 dollars ; 10 per cent. = 750 dollars ; area of constituency, 96,000 sq. miles ; voters, 300,000. Cf. also p. 521.

<sup>2</sup> The late Professor Victor J. West, of Stanford University, spent hours showing me how ingenious politicians could avoid these attempts to make them honest, and enlarged on the thesis that with every law not merely was a literary sin founded, but also a clever real one.

<sup>3</sup> Brooks, *op. cit.*, pp. 340-6.

<sup>4</sup> E.g. Utah (Pollock, *op. cit.*, pp. 251, 252).

<sup>5</sup> Brooks, *op. cit.*, p. 346. Cf. also Sikes, *op. cit.*, Chap. IV : ' Twenty states have decided that the reading public must be informed concerning what is paid political advertising and have passed laws that this material must be marked " paid advertisement " . This designation will show the voter that he is not reading an unbiassed discussion of a political platform or of a candidate's record ' (p. 91). . . . ' Four states have made it unlawful to circulate campaign literature reflecting on a candidate's character, integrity or morality. North Carolina has declared it illegal to publish or circulate false derogatory charges against candidates ' (p. 92). . . . ' A Minnesota statute provides that it shall be a misdemeanour for any person at any place on the day of a primary or election to circulate or distribute, or cause to be circulated or distributed, any campaign cards, placards, or campaign literature of any kind whatsoever (Genl. Stats., 1923, Sect. 551) ' (pp. 94, 95). . . .

Before the passing of a ' Statute forbidding the purchase of newspaper support ', the Vermont Supreme Court said : ' A newspaper is understood to present the views of some one connected with its management or views deemed consistent with some settled policy, and has a patronage and influence which are due to that understand-

paper support may, in some places, not be purchased. This seems to be generally obeyed. 'But what is the constitution between friends?' Pollock's conclusions are not optimistic; he speaks of general agreement that the laws on campaign funds are of little use; says that bribery laws are effective, limitations of expenditure innocuous, corporate contributions largely prevented.

'Speaking generally, the whole tendency of state laws on the subject is toward raising the moral law of elections, and it can hardly be denied that they have not been of considerable value in this respect. They have been largely instrumental in producing better political conditions to-day and no amount of criticism should permit this fact to be covered up.'<sup>1</sup>

Their efficacy, such as it is—and that an improvement has been caused is attested by a number of independent observers<sup>2</sup>—rests upon two grounds which issue directly from the democratic theory: first, that the citizen has the right to know what is being done in government, and that he has the right to revolt on the basis of this knowledge. In Germany the law relating to the sincerity of elections is mainly embodied in the criminal code, but there are further rules in the general electoral law, the laws relating to meetings, Press and the secrecy of the ballot. We are mainly concerned with the contents of the criminal code.<sup>3</sup> These are general and short, and their efficiency has necessitated parliamentary construction and application, especially

ing. As long as the editorial column is relied upon as a public teacher and adviser, there can be no more dangerous deception than that resulting from the secret purchase of its favour. We hold that the contract . . . is contrary to public policy, and therefore void' (*Livingstone v. Page*, 74 Vt. 356, 1902) (p. 97).

The State court of Ohio also held: 'The newspaper is an important factor in moulding public opinion. Its patronage largely depends upon its advocacy of policies sanctioned by its readers. By reason of its high position in our political economy its views on questions of private and public morality are stamped upon the individual. Often it does the latter's thinking, and very often its editorial policies find expression in the voter's ballot. The public policy, therefore, would require that its conscience could not be subject to barter, especially on those questions affecting the electorate. Buying its neutrality on election issues is as reprehensible as a purchase of its active editorial policy' (*Miller v. Glockner*, 1 Ohio App. 149, 1913) (p. 98).

With the idea of giving publicity to such ownership, Minnesota and Wisconsin require a statement of the ownership and control of any newspaper by a candidate or party committee to be filed with a state official (Minnesota, Gen. Stats., 1913, 569; Wisconsin, Stats., 1917, c. 12, Sect. 14). To give other candidates an opportunity to answer attacks, it is provided in Florida that if newspapers publish an attack on a candidate equal file space must be granted this candidate for a reply (*Comp. Laws*, 1914, Sect. 3841 v.v.) (p. 99). 'Quite a number of states have gone further than the mere regulation of campaign literature' (p. 100).

'In Oregon twelve words stating the measures he especially advocates are to be placed on the ballots opposite the candidate's name (*Laws*, 1920, c. 3979). It is apparent that little beneficial results can be expected from the placing of a few campaign slogans on the ballot, and, of course, with the long ballot generally used, it is out of question to allow more to go on it' (p. 101). Cf. Brooks, op. cit., pp. 348-50, 473-6, on publicity pamphlets.

<sup>1</sup> Op. cit., p. 259.

<sup>2</sup> Brooks, op. cit., p. 352; Sikes, op. cit., pp. 246, 247.

<sup>3</sup> 5 Abschnitt, Arts. 107 ff.

since the clauses of the criminal law were before the Revolution of 1918 not seldom violated by the administrative authorities acting under the orders of the government.<sup>1</sup> Whoever prevents a person from voting, either altogether or for a specific person, by a criminal act, is punishable with from six months to five years' imprisonment. Officials employed in the collection of ballots or registration and intentionally producing a false or corrupt result are punishable by a week to three years' imprisonment; others committing the same crime are punishable by imprisonment up to two years. The purchase or sale of votes is punishable by imprisonment of one month to two years—it may entail the loss of civil rights: 'purchase or sale' here includes material reward of any kind. Occasional gifts of beer are apparently not penal, but to swamp the constituency in beer is to invalidate the votes. However, where it is usual to provide free beer at election meetings (fairly common) regard must be had of the custom. The spreading of false defamatory facts about candidates is not a punishable electoral misdemeanour, whether actionable in the courts or not. Votes which are attended by improper practices are in some cases withdrawn from the total polled by the benefiter, and in other cases ascribed to the victim.

Systematic falsification entails the nullification of the election. Neither law nor practice limits the amount of money which may be spent in elections by either candidate or party (providing the articles of the criminal law are not violated); nor does the law require the publication of campaign funds; nor are there rules regarding the equality of placarding as in France, or the issue of publicity pamphlets as in various American states. Article 125<sup>2</sup> of the Constitution of 1919 says that 'electoral freedom and electoral secrecy are guaranteed. Details are to be settled by the electoral laws'. This article has so far not been interpreted to include anything more than the law established in the criminal code (with which we have already dealt). And secrecy<sup>3</sup> is dealt with by the Reich Electoral Law of April, 1920, Section 27,<sup>4</sup> and the Electoral Order of 14 March, 1924.<sup>5</sup> It is not an inconceivable interpretation of the Article that freedom is not guaranteed where electoral funds are large and secret—yet this conclusion has not been drawn by the electoral court.<sup>6</sup>

<sup>1</sup> By circulars, personal intervention at meetings and conferences, ballot papers sent through recognizable official sources, etc., the use of spiritual influence (by the officers of the Church). Cf. Bismarck, in Roëll v. Epstein, *Bismarck's Staatsrecht*. Cf. Hatschek, *Parlamentsrecht des Deutschen Reiches* (1915), p. 550 ff.

<sup>2</sup> Cf. Nipperdey, *Die Grundrechte*, II.

<sup>3</sup> Cf. Kaisenberg, in Nipperdey, op. cit., II, 160 ff.

<sup>4</sup> RG.Bl., p. 627.

<sup>5</sup> RG.Bl., p. 173.

<sup>6</sup> For this cf. Art. 31, and the commentaries of Anschütz and Poetzsch-Hoeffter, also Drath, *Das Wahlprüfungsrecht bei der Reichstagswahl* (1927); also Kaisenberg, *Der Rechtsprechung der Wahlprüfungsgerichte beim Reichstag*.

**The Cohesive Force of Parties.** We have seen how political parties act upon the electorate and have thereby succeeded in learning something of their nature. They are organized bodies with voluntary membership, their concerted energy being employed in the pursuit of political power. Their cohesive force is, we see, derived from a number of sources, fellowship, rhetoric, common festivities, material gain in the form of 'spoils'. All these things are the basis of community among men and find their place in every community; but a political party has yet another and decisive quality, that, of course, which makes it 'political', and gives a special character to all its other features.

The special cohesive element of a political party which differentiates it from other groups and causes political parties to differ among themselves, is their dogma of the Good State, and their desire and struggle for the power to realize its implications concretely in the institutions and behaviour of all. We have said that every mind is pregnant with a state; and so is every party, for a party is but a collectivity with a mind, and a collectivity which is deliberately founded and perpetuated by minds especially conscious of and zealous for the State whose seeds they bear. This is seen in the lives of the men whose theories and actions have caused the foundation of parties, and in any analysis of the policies put forward by them in our own day. There are as many potential states—or ends for which human behaviour might be controlled—as there are human beings; and the number of possible parties, or parts (*parts*) is as great as the population. Nor is that all. Men differ so bitterly on these postulates of political existence, differ spontaneously, without incitement, that they are prepared to cut short each other's lives by death, banishment, or incarceration, by the seizure of their goods and the closing of their temples, if they see the promise of the realization of their visions. Men are so alike, yet so different; and even the closest friends are doomed to go their own lonely paths as, with the passing years, the scrupulous mind scans the long succession of signs, engages itself in decisions and discovers the consequences, and ancestral tendencies reach their individual maturity.<sup>1</sup> Existence is interpreted differently; the passions are not controllable to the point of abnegation; and, in the end, who can validly deny any individual's belief in himself, in his biological characteristics especially? When all our reasoning has accomplished its purpose of clearing away ignorance and false logic, and has placed before us for judgement the material divested of misleading trappings—judgement still gushes freshly and individually, and threatens to urge us off upon a separate path, or to stay and insist that everybody else is wrong and ought to do right.

<sup>1</sup> Cf. Josiah Royce, *The Philosophy of Loyalty*.

If, then, there are so many unique selves, why are there so few states and so few parties? It is because whatever the power of mind, the energy of body, the strength of passion, of any single human being, accomplishment is impossible without the joining of forces. It is remarkable, indeed, to what an extent individuals and groups have sunk their differences in order to unite for certain purposes. The most powerful of all cohesive forces are those which have promised men the possibility of enjoying their differences without molestation—Order and Freedom. But there are many others, as we shall see, some being but special applications of these, others of equal status in human nature. Their proportions and interweavings, the scope and manner of their application to the peculiar environment and web of human relations and institutions, are the matrix of the state, and it is for the moulding of this into law that men cohere by subordinating less important differences to the more important similarities, falling, however, into hostile parts, or parties, for the assertion of those differences which cannot be subordinated or privately enjoyed without creating publicly hostile organizations.

In the modern state the power to cause men to act and forbear is legitimately obtainable by securing an electoral majority. It is for this that parties fight. We have observed them organizing, setting up candidates, preaching, researching, in order to obtain that minimum of like-mindedness which will at least result in the casting of a vote for them, and, where possible, will result in permanent loyalty and co-operation, i.e. membership. We cannot say that membership is, for all who are members, a *perfect* fellowship. There is much, as in churches and clubs, which disturbs this. The perception of minor differences may be controlled, but it exists; organization itself entails obligations like discipline, subordination, personal activity, the insolence of office, the spectacle of careerists who are in every action enemies to the cause, but indispensable as a means to its success; ambition triumphs over devotion; inherited monopoly over capacity—all the difficulties and trials of political life are as existent within the party as outside it. Between member and member there are differences, between the knot of leaders and the followers there are differences. One locality interprets the message in one way, and, in another, a variant is more pleasing. Yet there is one fundamental dogma informing all the members, strong enough in its appeal to make them into permanent offensive and defensive associations, to make them suffer and act, create and destroy, sorrow and be glad as one. This *credo* is discoverable in the general policy or aims of the party, in its programme, which is the application of the policy to immediate problems, in the history of its activity, which not infrequently diverges into courses not inferable from the aims or programme, in the attitude of mind of its philosophers and its practical



leaders. If we sketch these things in each country we shall attain two important objects: a knowledge of the actual division and significance of parties in each country, and knowledge of the great present-day divergent philosophies of social and individual good through political action.

## CHAPTER XV

### THE CREEDS AND POLICIES OF MODERN PARTIES

ENGLAND has three important parties—the Conservative, the Liberal, and the Labour party, and the small beginnings of a Communist Party; the U.S.A., two major parties, the Republican and the Democratic, and some minor parties, chief of which is the Socialist Party; Germany has seven principal parties, the German National Party, the German People's Party, the Centre Party, the Democratic Party, the Social Democratic Party, the National Socialist Party, the Communist Party, and many minor parties. France has a confused mass of parties from which emerge, with a history, *l'Action Française*, the *Fédération Républicaine*, the *Alliance Démocratique*, the *Radical-Socialistes*, the *Républicain-Socialistes*, the *Socialistes*, and the *Communistes*. The countries differ, then, in the number of their parties, and we shall study the effect of this upon the effectiveness of government and civic behaviour; as remarkable is the variation undergone by the fundamental themes issuing from man's political nature. We shall see how at the contact of minds of different types with different problems diverse solutions have come into being, causing men to group themselves in ways, peculiar to them, to find new methods of contest and co-operation, to acquire unique oddities of demeanour and a language all their own, gibberish to their opponents and to foreign countries, but replete with meaning for themselves.

#### ENGLAND

Modern parties first appeared in this country, for here the Revolution which was the prelude almost everywhere to democratic government came earliest, and differences were brought out from the private council of the King to become public confrontations. In the constitutional conflicts of the seventeenth century arose the two camps—Tory and Whig; but we have learnt enough to know that men do not fight merely for a constitution, but for a good which it is to authorize and defend. The forces behind those conflicts pervaded the parties and caused their hostility, and down to our own day have continuously maintained a significant distinction between the parties, which in time came to be called Conservative and Liberal. Even as

political feeling and thought produce variety of doctrine and behaviour according to place, so do they according to time, and the history of Conservative and Liberal doctrines is necessarily one of digressions and deviations from their central character: but the central character is there, it does determine the solution in time and place, and, moreover, it is peculiar and clearly distinguishable. But we cannot follow out historic reactions: we can only attempt to penetrate to the sources. Early rivalry was not expressed as in the great organizations of to-day, but in the leaders to whom different knots of men looked and the rather vague general doctrines they held. The differences were recognizable if not constitutionalized, and the opposing faiths not seldom won away members from their previous allegiance.

**Conservatism.** The essence of conservatism is to be discovered in the social institutions of which it approves and its attitude to the idea of Progress. The social institutions favoured by Conservatives are crown and national unity, church, a powerful governing class, and the freedom of private property from state interference. Each of these is desired both for itself, as an end, and also as a means to something else. The Crown is at once a glorious monument, a centre of social life conferring distinction and prestige as one approaches it, a sign of the nation's age, a symbol and an instrument of political authority and unity, an evidence of the virtue of heredity, a link of Empire. The depth of reverence for the Crown and the Royal Family is extraordinarily profound and the fervour of the toast 'the King, God bless him!' is so emphatic, that, if the circumstances and the evidence did not show that the speaker was sincere, one would suspect caricature. This is an ultimate in human nature, issuing from reverence for the distinguished, especially when such distinction is the result of birth. Not that this is unprompted or comes from a vision of the ruler of the day. A long line of monarchs is dimly seen traversing centuries; each is clothed with qualities colossally virtuous; they are above the average, more even than humans. The response is awe and obeisance. Moreover, the Conservative has always, and does now, as we have reason to discuss in the chapter on Chiefs of State, apply all the contemporary means of publicity to the creation of the legend that the monarch and his wife and children possess ideal and supernatural virtues.

When such loyalty is attracted on a large scale it is clear that proximity to the object thereof lends social prestige, and this again is valued tremendously by Tories, even attracting the more snobbish Americans, though their constitution was founded on a virile renunciation of Kings and Courts. Presentation at Court is, indeed, worth political influence and votes to those who bring it about, although this is not the immediate object of presentation. So, too,

does a royal visit to slum neighbourhoods have a conservative influence. The Crown, as the chief symbol of unity in Nation and Empire, is of immense importance in the Tory mind, at least on a par with Parliament, sometimes transcending it. For, instinctively, the Conservative is enamoured of national and imperial unity. There is a strong element of co-operativeness which, though its object may be restricted, is nevertheless stern within its scope; and this itself is founded upon an ultimately irrational, quite mystic, devotion to the national community, the community of race and history. Of this, obviously a dynasty is an admirable symbol; is, indeed, a part; and it is understandable that though the origins of that dynasty may have been alien, and its accession bitterly contested by the forbears of the Conservatives of to-day, these facts should be ignored. At a certain point every practical thinker and leader becomes blind; and did they not do so, they would be irrevocably lost upon the sea of doubt. Rationally considered also, Kingship is an efficient attraction for loyalty, for its hereditary origin impresses many and lends itself to the deliberate ascription of all those virtues to which most of us render homage.

The Conservative sense of Nationality is intense, and its most frequent judgement is that such and such a foreign country or sect is untrustworthy. It has faith in the superiority of the race to all other races, even its allies in war; and belief in the superiority of its own political institutions and traditions, and in the mission of the race to carry out the civilization of other peoples, even against their will, and even with violence to the point of diabolical brutality. This feeling of nationality reveals itself in a glorification of all that makes for the defence or aggrandizement of the country; a grandness considered rather in a material and warlike light than founded upon artistic achievement. It shows itself unwilling to enter into foreign alliances and engagements except those absolutely necessary for the defence of what lies within the national boundaries. Empire is its very breath: for it betokens the potency of the race to extend its force and rule, and success gives the presumption of high spiritual value. Yet even the Dominions and Colonies are *not quite* the homeland, not quite the county, or the town, the parish or the church which mothered their body and soul, and actually planted part of itself abroad, and still rules them from the 'homeland'. Nothing *quite* reaches the proud level of the indigenous: these are God's own, destined to be right whether they act or forbear, are consistent or inconsistent, slay or give life, break the Commandments or keep them.

Nevertheless, *noblesse oblige*: the station requires sacrifices; and national unity, which is the first foundation of national strength, must be preferred to other goods: one must submit to heavy taxation

and not actually revolt; one must see the House of Lords brought low in esteem by a crowd of newfangled peers and simply bite the lip; one must see the Imperial services given over to natives and others no better, and bide one's time—but the Nation must not be rent asunder. Yes! The Crown itself must be constrained to the service of national unity, even when that means the forcible retention of an alien population within the State, as when the Crown was dangerously counselled to use its veto power to overcome the Home Rule Bill. For behind all is the desire for dominion; and to lose Ireland was a prelude to weakening the bonds of the Empire; moreover, how dangerous to national existence to have a weak, perhaps a hostile power, so near the *English* coasts! It is right to divest others of self-government if it will cause you any danger. Now aliens are always a danger: they have strange philosophies, necessarily issuing from their queer racial composition. It is not wrong to regard them with a tolerant and patronizing amiability when they are useful and amusing: after all, foreigners cannot be expected to know the English language or to understand English customs and 'good form'—but they can be useful and amusing. Yet if they are adequately kept on chains, or not taken really seriously, and if one is vigilant to detect and destroy the signs of corruption and treachery—then use may be made of them. However, they should not be granted full rights of citizenship!

The Established Church of England was from the beginning a Conservative institution—indeed, the battles of the seventeenth century were largely the outcome of disputes about its position. For the Tories it was their own special Christianity against that of Roman Catholics and all the forces of Dissent. It was an institution at once made by the Crown, and making the Crown: 'No Bishop, no King'! It was thoroughly national, had no commerce with dark foreigners like Jesuits, and saved many a foreign entanglement. It preached obedience, and while not too austere, had an eye for such proprieties as almsgiving and a proper respect for the gentry and the institution of the family. Its creed and organization could be controlled, they made no exacting demands. Property and livings helped the younger sons; patronage brought political power; sermons could be political addresses stressing obedience to all constituted authority when it was composed of Tory and King. Moreover, the parson was a permanent Tory election agent. The Test Acts purified the sources of power—politics and teaching—of Catholics and Nonconformists.

It may be doubted whether the Church and its fortunes have meant very much to Conservatives in the last two generations. There are strong Churchmen in the party, as for example, the Cecils, but all Churches have lost much of their authority. The modern

world has not ceased to be impelled by ideas for which it can offer as little explanation as men who embraced the orthodox creeds, but they are ideals otherwise orientated, and the Churches themselves have diverted their own religious fervour into these new social quests. Acquisitiveness and sex theories have struck the pillars of the Church blows under which it reels, and altogether men's spiritual venturesomeness has in every direction escaped the narrow if divine channels of the Church.<sup>1</sup> Not many people are Tories because the Church of England calls them, or even because the notion of an established Church of any kind is inviting; but some, perhaps more than are to be found in the Liberal or Labour camps, feeling the essential impulse towards unity, stability, obedience and a reining-in of the errant forces of the human mind and body, favour the idea of establishment—that is an official connexion between Church and State; the Church to be the exponent of a doctrine with a religious sanction which shall stop dissension. Predominantly, still, the Church of England is Conservative in its personnel and in the political tenor of its doctrine.

The recurrent motif of Conservative policy has been the need of a privileged governing class; they believe that there are people who have the skill and the right to govern independently of the popular will. From the end of Elizabeth's reign they insisted that government is, of right, the King's possession and, naturally, of the advisers he calls to his counsel. It is true, that following Bolingbroke, many argued that the King was to be a patriot, a philanthropist, but this is remote from the doctrine of government by consent, and has, indeed, been used to bolster up the most nefarious tyrannies, as, of course, it is the standing temptation to establish them. When the Tories cried out for Parliamentary reform—as they often did in the seventeenth and eighteenth centuries—it was to spite their Whig rivals by excluding Dutchmen and Whigs from office by Place Bills, and, by shortening parliaments, to appeal to the people more often, thus threatening the hold of the Whigs over Parliament and the Crown.<sup>2</sup> But when it came to any serious partition of political power with any body in the nation not sanctioned by long usage or controllable by wealth and influence, the matter was differently viewed. So fierce an opposition was engendered that the country was all but wrecked, and, equally calamitous, the House of Lords all but swamped! Reason and utility challenged traditions long accepted and pleasant for those with hands upon the levers! A matchless and envied constitution was to be unbalanced! The mob was to be let in, under the name of Democracy, and it was quite clear from the experience of France

<sup>1</sup> This position was further exemplified when the divisions on Prayer Book Measure were left free.

<sup>2</sup> Cf. Veitch, *op. cit.*; Macaulay, *History of England*.

that this meant disorder and a universal levelling! Property itself, no longer a stabilizing force, would be swept away! 'I hold it as a maxim that every Government which tends to separate property from constitutional power, must be liable to perpetual revolutions; for power will always seek property and find it.' But the Tories have been swept along by the tide of time and necessity, and in 1867 they themselves forestalled the inevitable, trafficking time for popular gratitude. Yet they have followed, not led, the march towards universal suffrage: and with lamentations.<sup>1</sup> They, also, are the last to accept the doctrine of the member of Parliament as delegate.<sup>2</sup> They are the last to assert the possibility of an enlightened democracy, and insist more than any other party upon the ignorance of the electorate and its unfitness to govern, and more, the natural impossibility of its ever being able to govern, since this ability is, apparently, derived from hereditary talent to be found only in the descendants of those who have so far enjoyed governing power.<sup>3</sup> This, again, leads back to a fundamental tenet—that there is virtue in heredity, more than a presumption, that he who is born of socially powerful and wealthy parents has qualities above the average, rightfully entitling him to govern others. Therefore, too, the inveterate defence of the House of Lords, and the belated search for utilitarian arguments in its defence in an age when everyday facts, as well as biological theory and historical research, have spread the view that the doctrine of 'blue blood' is solemn nonsense.<sup>4</sup> Therefore, also, the disbelief in the right of self-government for other peoples: especially those within the Empire who are too weak to enforce their rights. Not that the Tory is always wrong in this view—but he insists on it with much greater emphasis as an inevitable and irremediable fact, than do Liberals and Socialists.

Other parts of this study have shown that in the nineteenth century men became increasingly occupied with the pursuit of a High Standard of Living by new methods of production. Almost concurrently equalitarian ideas became widespread and social sensitiveness to the misery of the poor caused the commencement of a movement to establish a minimum of comfort, economic safety, security, education and health. What was the Tory response? Two fundamentals were involved: Private Property and State Interference. Conservatives have been fierce defenders of private property, and this against the two main forms in which it can be practically attacked by the State: taxation and control of use. Conservative taxation theory has

<sup>1</sup> So, too, in regard to Women's Suffrage and the Age Qualification for voting.

<sup>2</sup> Cf. G. Lowes Dickinson, *The Development of Parliament during the Nineteenth Century* (1895), p. 77 ff.

<sup>3</sup> E.g. Maine, *Popular Government*.

<sup>4</sup> Cf. A. F. Pollard, *The Evolution of Parliament*, 2nd Ed. (Longmans), 1926, Chap. XV.

recognized the right of the State to take the least obtainable from private pockets, and has been the inveterate foe of direct taxation in all its forms, on income, land values and legacies. It has attempted to create a circle which is sacred from the reach of the State, for, as we have remarked, it will not have national unity and strength at *any* price; and it has attempted to show, with some success, how the whole State suffers from the frustration of certain instincts, like acquisitiveness, and parental affection, by confiscation. It has ever been more friendly to indirect taxation, which tends to act degressively, and to put the burden on those who least can bear it.

Further, it has denied the right of the State to limit the uses of private property.<sup>1</sup> It is true that a number of Tory philanthropists have devoted themselves to social reform<sup>2</sup>—early Factory Legislation being the first example of this, the promises of Tory Democracy<sup>3</sup> its middle period, and Widows' and Orphans' Pensions the most recent tribute. All of these subjected property to State control. But for the most part they were produced after a period of electoral and parliamentary agitation, not at all willingly on the conviction that a measure of justice might produce a better England, but out of a spirit of charity, when that had become inescapable through outrageous misery and parliamentary agitation. The theory was plain: no one has a right to demand these things; it is better not to give, for this will sap the springs of individual enterprise and virtue, but if anything must be given, let it be given of charity and not of right. In our own day the defence of private property, which was once a principal tenet of the Liberals, has become vested mainly in the Conservatives. They remain its adamant crusaders; and this attitude is best seen at work in the problem of the coal industry, and in that of municipal and private industry generally. It has been found that the coal industry cannot attain anything like its full efficiency unless there is a reorganization which, by reducing competition and amalgamating the private property units of production and distribution, will avoid tremendous waste. Conservatives have been the constant and vigorous defenders of the inertia of the coal owners.<sup>4</sup> Their general attitude has been: the pits are private property, hence no one has the right to interfere with their management. They have denied the right of the whole community to control what is a substantial source of welfare for millions of fellow-citizens.

<sup>1</sup> Cf. the fierce insistence on the Game Laws. The question of reform is commented on by Dicey, *Law and Public Opinion in England*, 2nd Ed., London, 1914, pp. 87, 88.

<sup>2</sup> Cf. Dicey, *op. cit.*, p. 220 ff.

<sup>3</sup> Wilkinson, *Tory Democracy* (1928), Chaps. 2 and 3; Buckle and Money Penny, *Life of Disraeli*; and Sichel, *Disraeli*; Churchill, *Life of Lord Randolph Churchill*.

<sup>4</sup> Cf. Evidence of the Duke of Northumberland before the Coal Industry Commission, 1919 (Cmd. 360, Vol. II, *Reports and Minutes of Evidence*, pp. 621-31).



The general attitude to municipal and private industry is much the same: it is, that the prospect of *personal* gain and loss best guarantees productivity to the community, and justice to producers and consumers. This is the rationalization of the simple disposition to say, 'Let me alone: this is mine, and you shall not touch it!' This leads directly to the problem of State Interference. The Tory view is, 'The least, the better!' Although at one time it was interventionist, it is now the defender of *laissez-faire*. Most people who are well endowed with all that they want in terms of wealth, education, and pleasure, are inclined to insist that they are better left alone. It cannot be denied that Toryism is embraced and propagated by such people. They are not ungenerous in unprompted giving, that is, when they may do as they like to do; but State command is anathema. Hence the Tory hatred of officialdom, which it calls and teaches others to call, Bureaucracy: less competent than private people, usurpers, eaten up with routine, dangerous to liberties, extravagant! Now all these things are true in their time and place; they are false as well: but to the Tory they are an almost unchallengeable creed because officials are the instrument of State activity. Is the State, then, to do nothing? The Tory does not hold this view. The State is to establish and not to disendow a Church; it may call, by conscription even, for the lives of its citizens when danger threatens; it must protect property—especially game on landed estates; and, nowadays, it may by protective tariffs divert the whole natural course of industry and commerce in order that 'national' ends may be pursued, nor must one let the condition of the people sink dangerously low, nor ought one to give free play to disruptive tendencies within the State, like the Trade Union movement, nor permit the untrammelled advocacy of strange doctrines like Communism.

For, after all, what is our destiny? Is it not idle to imagine that any great improvement in the nature and habits of man is possible? Surely all talk of Progress and Perfectibility, which has been the impelling force of so many reform movements, is vain? Human nature is, on the whole, drab and of poor quality. Needy, dishonest, unintelligent, and unteachable, it cannot be expected to scale the heights. It is enough if it can be led and controlled by the few natural leaders who are born and have the acumen to discover and apply (for they cannot create or influence) the plain laws of humanity's being. If we can progress, it is plainly at a very slow rate; any sudden movement in so complex a thing as Society—any movement at all—may cause the downfall of a system so delicately balanced. Men are not easy to manage, they do not (unfortunately) accept the necessary yoke cheerfully, and to cause them to hope too much is to cause them to break loose. All history teaches that what is, is, because it has been found good. To reform is to disturb, and to disturb is to break down

without the certain hope of building, not only anything better, but anything at all.

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**Liberalism.** The Liberal creed is more an amalgam than the Conservative, and this is easily comprehensible, for the party of conservatism and defence is not, like the party of attack, compelled to seek new weapons and justification, while the very essence of Liberalism is openness to new experience and the vindication of free growth. It began in the religious struggles of the Reformation when the right of individual judgement and testimony in matters of faith was asserted, and developed soon into an assault upon the notions of a State Church and arbitrary government. These have remained fundamental propositions in the latest history of the party, its new and radical elements of the nineteenth century supporting them from character and interest. The machinery of government has been a constant interest of Liberal thinkers because therein they have seen the potentialities of freedom or despotism; and their quintessential preoccupation, the axiom of their existence, has been the ultimate and transcendent value of the individual personality. In the time of Locke and the Revolution this was expressed in the doctrine that individuals freely make their government, and assign to it only as much power as they think good. The theory was the product not of experience but of a wish, and that wish has unified and determined Liberal faith and policy.

The individual is prior in importance to the State. Only in the individual appear the principle of growth, of initiative, of creation, and the possibility of really assenting to its validity in other people. The ultimate goal of existence is to produce the greatest number of perfect individuals. The pattern is not to be dictated by those with coercive power, but freely accepted by discussion, reasoning and judgement: for no one can say for certain whose truth is more valid, more beautiful, more vitalizing, and the only hope, therefore, of discovery, lies in an equal opportunity for all to utter and evolve, with organized restriction, which prevents the destruction of this opportunity, reduced to a minimum.<sup>1</sup> Its life-breath is the impossibility of knowing all that is latent in human nature, the strong hope that what is there is good and will prove so, the belief that without freedom nothing valuable can arise, that variety which proceeds from liberty is productive of a more beautiful world than any imposed uniformity. How has this generosity and optimism been applied in English politics by the party which is founded upon it?

It has not denied the claim of nationality and race, their beauty and the necessity of their preservation. Patriotism is the opportunity

<sup>1</sup> Cf. Chapter on Democracy, *supra*; and also the attitude of mind expressed by William James, *Letters*, Vol. II, p. 100.

of service and the motive to free collaboration. It is a support and stimulus to the full growth of that peculiar difference which inheres in each special ethnic portion of the human race. It deserves defence and encouragement, for none can understand and promote it so well as those who naturally and freely share its biological and cultural heritage. It may even transcend the limits of its own frontiers, offering a guide to those whose condition or reason leads them to accept it. Thus it can have a mission, but not an imperialist mission. It may teach but not coerce. And if it should mistake the point where education becomes coercion, or find itself burdened by an Empire made by others, then its duty is to prepare the subjugated peoples for their freedom. Nor is it right to safeguard one's own civilization and national strength by 'unduly' placing bonds upon those of other nations. But 'unduly' has not been interpreted in as liberal a sense as the general tenets would lead one to expect; it has rarely received the interpretation placed upon it by the Conservatives, but it has not seldom approximated to it.

Human salvation may possibly come from some source other than ourselves. The civilization of others is to be respected. When they threaten our own in the extreme we may be forced to self-defence. That is a tragic necessity and not one over which we can rejoice; and it does not justify the piling up of armaments. On the contrary, for two reasons it requires that every effort be made to establish machinery for an understanding in order that all the acts of compromise and the mutual promise of toleration may be exhausted first. Those reasons are, that to kill each other is not to settle anything except that one side has caused the other to surrender, that the aftermath in terms of human habits of force and discipline is evil, and because armaments are costly and every pound spent upon them by the State is a deprivation of individual liberty. Every means of international understanding and harmony is to be adopted; and this end is served as much by Free Trade, which avoids economic friction, as by the machinery of conciliation and international justice.

That same harmony, and reasoned appeal to tolerance of the individual way, is to be sought within, as without, one's country. The prime means to this in the modern complex State is to open every channel of free discussion. Hence, all who are expected to obey the common measure of regulation must be consulted in the establishment thereof: all must meet in the parliamentary assemblies upon equal terms, all men of whatever social rank, station, and wealth; and all women too; perhaps, so also, in the control of industry and commerce. Further, the majority, which, by this theory and the operation of party government, will come to exercise domination, must be temperate in its use of the power it acquires. Nor is that

all. Special provision ought to be made for consulting minorities who are likely to be crushed by the operation of ordinary electoral systems. To centralize government gives strength : but the development of the individual is better fostered by local self-government : indeed, better no government at all if possible, and, if not, then in the local authorities, and by the central government only as a last and inevitable resort. It is to be hoped that such a reign of liberty will produce good counsels and government by consent of the governed. If it proves that human nature is defective—and only then—the minimum necessary safeguards may be established. Beneath all this the foundations of freedom of speech, writing and meeting, must be respected : free expression is the means *par excellence* to reduce error, spread truth, and add full zest either to innovation or to tradition upon its defence. This is valid for ecclesiastical as for secular truth : no priestly domination at the public expense : live only at the cost of those who gladly admit your right to live ! Hence Liberalism in the nineteenth century set itself to cast down the barriers to the free expression of opinion, disestablished churches where it could, and commenced the system of free public education with safeguards for all denominations. Not that it was possible or thought desirable to march the whole road to these ends.

From the rise of the new industry and commerce, Whiggism received the impulse which caused it to become Liberal and sometimes Radical, and to overthrow the monopoly of political power of the landed interests by the passage of the Great Reform Bill and the reform of the Municipalities. The economists and political scientists who provided that impulse were not, and, perhaps, could not be, sufficiently aware of the difficulties inherent in the full gospel of *laissez-faire* applied to industry and commerce. But their influence made for Free Trade on the ground that thereby every country produced what it could most economically produce. In other matters they saddled their party with a doctrine which was destined to be its downfall at the turn of the twentieth century—that is, the doctrine that the ‘invisible hand’ of competition would produce a harmony of economic interests, the greatest happiness of the greatest number being thus securable. The accession of strength from the commercial and industrial middle classes, schooled by a long experience of the glorious result (for them) of self-help, further emphasized the force of the dogma. Liberalism had not faced this difficulty : awful misery, and even death, is a necessary incident of the state which is so designed as to let the strong win. We do not know what a really Liberal civilization would produce in the long run, when the unsuccessful had been destroyed by the rest. It might be very fine, or not. No one knows ; no one can guess ; and even the greatest Liberal philosopher, Kant, never made an attempt to find out. But we do know

that men refuse to be trampled down, that onlookers are smitten with compassion, and the result is social control. Bullied and preceded by the Tories, and harassed by voters, Liberalism has become increasingly Socialistic; once the promoter of competition, it has become its regulator. The scales must be equal to give the results which Liberalism predicts. The good, in short, is to be obtained by regulation. The good, however, is still the greatest individual development of the greatest number, and the emphasis is still laid upon the fortune of the individual. This is the touchstone of all regulation; and the bureaucracy which is the necessary accompaniment of regulation must be popularly controlled, and liberalized by the nature of its education. Property was once as sternly defended by the Liberal as by the Tory Party; for each was the party of the propertied, and if anything, the Tories were willing to recognize that property had some obligations, while the Liberals of the early nineteenth century believed that charity was demoralizing. Liberalism has, however, softened in this respect, and much more than the Tories, believes in the righteousness of considerable national expenditure for the provision of a minimum of amenities for the poor. Indeed, the years from 1906-14 saw the introduction of important social legislation and the severe taxation of income and legacies.

Thus, there is a clear and emphatic difference between the Tory and the Liberal creeds, although the events of the War and its aftermath have tended to obscure it. Each stood and stands for a different view of human nature and its possibilities, and the extent to which, and the reasons why, it should be free of control by the community. The desire to win victories for their general theories and office for themselves, has sometimes caused them to carry out each other's policies, but this has never been done for long, or in any really serious matter.

Who have followed the parties at different periods? The strength of the Tory Party since the Reform Bill has always been in the Counties.<sup>1</sup> This does not mean that it has been badly supported elsewhere.<sup>2</sup> But the Counties have been peculiarly Tory: for the land has been the source of both wealth and social prestige; it has bred rich men and attracted them. Further, the peculiar dependence of the Church and the agricultural labourer upon the squire, strengthened by the ignorance of the former and the belief that loss of employment would follow upon independent voting, has swept hundreds of thousands into the Conservative camp. Ignorance, charity, and snobbery cemented the workers in the country to the party of the

<sup>1</sup> Cf. *The Geographic Distribution of the Vote*, given in the form of a map by *The Times* (London) immediately after each general election.

<sup>2</sup> Cf. Gosnell, *Why Europe Votes* (1930), pp. 14 ff.; and Krehbiel, *Geographical Review*, December 1916, 419-32.

rich men. Protection and the relief of rates were the gifts of the party to its supporters—and the maintenance of the Church of England. The issue of free trade, once settled, the upper middle class of manufacturers steadily went over to the Tories, until now nearly all the interests with property which it is desired to save from control or taxation have moved into that party. Many were attracted, also, by Imperialistic and aggressive foreign policy: for this appeals to many people, besides promising economic opportunities abroad, such as markets, concessions, and openings in foreign and colonial administration for sons who have been brought up on an income which they cannot earn in equal competition with others at home.

Voting statistics show, however, that many members of the lower middle classes and the workers in the towns must also be supporters of the Conservative Party; and it is true that the party is able to attract large numbers on the score of its policy other than economic. Many medical men and teachers, for example, follow it because on the whole they believe in the glory of the national history; its gospel of the need for authority, discipline and strong government is held by large numbers of people as the sheer outcome of their own temperament and experience, and they are thrilled by the size of the Empire, and the immensity of the achievement it implies. Many fly to the party as a refuge from queer foreign doctrines about the nature of the community's control over the individual, and from more or less garbled accounts of an alien morality regarding property and sex which really frightens them, and this is, of course, identified with the rival parties. And a vast number of people are attracted by the simple appeal of the stability and unity of the country. The suburbs, the home of superior clerks and the middling independent professional or business man, whose whole being is founded upon his inherited or acquired superiority, and the seaside resorts in the South, are Conservative strongholds. They cannot admit the doctrine of equality. Thousands of working men and women are overruled by the splendour of the Crown, the history of the Union Jack, the deeds of the Navy; they are nationalist without knowing why, because so many of us are proud without knowing why. Snobbery and charity win thousands. Others are disgruntled; hating their colleagues who have advanced more rapidly than they, disappointed after having expected too much, or simply from a grumbling disposition. There is a bigger proportion of the rich in the party than in any other party: a bigger proportion of those interests, like that of brewing, which fear the missionary enterprises of other parties; and, therefore, direct economic benefit or defence is the motive for many—but not for all. It should not be left out of account that the figures of voting themselves show that over one-half the followers of Conservatism have no direct economic interest in the

success of the party;<sup>1</sup> but it is, of course, difficult to say how far the claim that employment and high wages are to be assured by Protection brings followers. We cannot argue that the Tory Party is a Class party, if by class is meant a group founded entirely upon economic expectations. The Tory Party is a spiritual party as well as an economic party: for a large part of its following seek satisfactions other than the increase or defence of their riches.

The Liberal Party is, in the towns, followed by the middle and lower middle class—shopkeepers, small craftsmen and the like, who are employers of labour on a small scale, but who are not much affected by the economic policy of the Conservative Party, cherish an affection for Free Trade common among those who are in fairly direct touch with their consumers, and often Nonconformists. A fairly large working-class vote is presumable also, since the Liberal and Radical clubs still attract clerks and artisans who desire the schemes of social amelioration and economic renewal promoted by the Labour Party, but are unwilling to leave the older party which pretends so much respect for individual freedom. There is a large section of the people with much social generosity and a great deal of personal hope from State intervention, but who, by temperament or reasoning, think the Labour Party dangerous and the Tories impossible. The Liberal philosophy of self-reliance and toleration is a powerful attraction to those who have come, by experience or education, to realize the importance of human personality, freedom and peace. Liberal strength in the counties lay for generations in Nonconformist areas like Wales and Cornwall and Devon, East Anglia and the North. Into these the Labour Party has bitten; but the tradition of Liberal tenderness for the Chapel is still very effective. To sum up, I should say that the Liberal following is now rather a residuary collection of elements which cannot find a comfortable home in either of the two extremes, much of its present strength coming from the traditionary allegiance once given to freedom and harmony as applied to the Church, foreign affairs, tariffs, and the franchise. There is still a

1

1924

Income Groups.		Distribution of Votes.	
Estimated number of persons with incomes above exemption limit (£150) . . . . .	4,700,000	Conservatives . . . . .	7,854,523
(Includes also 1,600,000 manual wage-earners.)		Labour . . . . .	5,489,077
Wage-earners below exemption limit . . . . .	13,800,000	Liberal . . . . .	2,928,747
Other than wage-earners below . . . . .	2,000,000	Communist . . . . .	101,803
		Constitutional . . . . .	185,075
		Independent and other . . . . .	81,054

The figures of the National Income are reproduced from the Table, p. 14, in Bowley and Stamp, *The National Income*, 1924, Oxford, 1927.

powerful attraction in Lloyd George, both as a fighting figure, and as an advocate of the interests of the land.

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**The Labour Party.** The Labour Party was created as a challenge to both the old parties. Quite early in the nineteenth century certain men had seen that to rely upon the existing parties for any great alleviation of the workers' condition was only to court disappointment, and the Chartist Movement was the first attempt of working men to lead working men to the assault upon political power. Why could they not leave the old parties to their own evolution, trusting to the competition of one party with another to give the working man what they thought was his due? Manifestly all depends upon what was considered his due, and it was the formulation of a theory of society so radically different from that held by the leaders of the Conservative and Liberal parties in the 'seventies and 'eighties, that no substantial satisfaction was to be expected, as quickly as men like to expect the fulfilment of their ardent desires.

I do not wish to trace the history of Socialism, for it is available in all sorts of convenient forms, but its essential features must be sketched. A number of men and women of acute social sensitiveness, and some of great artistic perception and creativeness, perceived that society suffered from the most vicious inequalities. The greater proportion of mankind were sunk in bodily and mental misery and servitude, while wealth, culture and the opportunities of a free choice of occupation and pleasures, were in the possession of a small minority. Between these inequalities, and the moral worth of those who enjoyed or suffered them, there was no just correspondence. Christianity, the accepted religion of almost all, and the established religion of the State, set certain standards, but in everyday life these were practically ignored: men *lived* an entirely different religion, and virtue and earthly reward were assessed upon other principles entirely. Nor did those who possessed wealth and opportunity devote them to the creation of beautiful things for society's enjoyment, but, instead, wasted their substance upon the basest purposes, petty sensual indulgences, and such great evils as war; and neither God nor man profited.

Nor had the power exerted by the rich and strong been produced by eminent virtue, but, more often than not, it began with despoliation and the enslavement of the physically weaker, and thus was continued, aided by the legal process of inheritance. Power of life and death, and over men's minds through the domination of the Church, passed into the hands of a few, and these were enabled to exploit the labour and lives of the rest. All the potentialities of man, those which, with faith and freedom, would have unfolded like the flowers as the earthly expression of the ultimate creative purpose, were crushed



and crippled by the hideous contraptions of death, daily brutality, floggings, mutilations, imprisonment and the wickedness of transportation (when these themselves were often synonymous with death and, at least, permanent separation from homeland and family). History had shown that there was a natural rise and fall of talents where there existed no monopoly of wealth and arms: the vicious, incapable and perverted fell, while the virtuous, capable and upright advanced, to the glory of society, the arts and learning. Indeed, the proper arrangement of social institutions could lead man from his low state of civilization to an ultimate perfectibility.

What, then, was to be done? The front and centre of social inequality and demoralization lay in economic inequality. Who had the material means controlled society and all its spiritual manifestations, for man is a greedy animal, and will sell his noblest hopes, will even marry and breed for money. All Socialist thinkers have insisted upon the economic determination of social development, but most of all Karl Marx, in a thesis which has been named the *Materialist Conception of History*. There is an important truth in this, but it is not the whole truth. Parties seize upon broad and vital truths first, and acknowledge the modification later: and the question of economic inequality was the most powerful upon which to build a party, precisely because its truth hardly needed any demonstration to great masses of men, women and children who dwelt in a society, the livelihood of which was made by that combination of machinery, factories, and managership by private property-owners, called the Capitalist System. That system must be abolished, for while it exists there can be no real equality, no real self-determination, no culture free from distortion, no collectively-determined creation of anything valuable.

It was quite clear that mere discussion and argument would not persuade the leaders of the old parties into approval of this conception of history or politics, and of teaching their followers that this was desirable. At the most, the severest forms of misery were cured by health and building regulations which certainly cost money, and by occasional concessions of education, by the regulation of hours and conditions, and the payment of labour. But all was done after a struggle, and not much, on Socialist assumptions, even then. For the truth was that those who had a monopoly were not prepared to give it up until they were compelled. They could prove that they themselves had made some of their wealth, if not all of it, discounting the opportunities and the security provided by the lawful behaviour and the inventiveness of their fellow-citizens; they could prove in a hundred irrelevant ways, but satisfactorily to themselves, that they were virtuous and others were robbers; they could even show, with truth, that accumulation tended to preservation and economic develop-

ment, and that this was of benefit to the whole country. They could persuade themselves that they were of a biologically superior stock, either by heredity, when the fortune had been inherited, or of themselves, when they had built their own fortunes; and their physical appearance and educated manner gave a semblance of truth to such a claim. What! Give other people's children opportunities as good as to their own? Allow their own children to go to publicly-provided schools? Not pass to them those advantages of culture and cash which would protect them from the competition of the strong, and sometimes, if necessary, even from the full rigour of the law? It would be unnatural. So, indeed, it is: and every great reformer, from the time of Christ and Plato, has been dismayed by the invincible crags of property and family; which, in other words, are nothing other than self-preservation and self-development. Few people will surrender these things out of rational observation that the result may be a good society; there are too few tangible securities for such a promise.

Therefore, Socialists called this attitude 'selfish', and determined to do what all statesmen do when individual, family or group loyalty stands in the way of their designs—to obtain politically a majority which would enable the State to override them. Hence the beginning of a Socialist movement and the creation of the Social Democratic Federation in 1881, the Independent Labour Party in 1893, and the Labour Representation Committee in 1900.

What we have so far described is the general attitude which caused revolt against the existing state of Society, but the organizers have not been able to lead vast bodies of men and women to an unqualified and immediate acceptance of all their tenets. For the Labour movement was born into an electorate already divided between the older parties, already organized in part to secure a measure of economic justice through its Trade Unions, surrounded and impressed by Imperial obligations and foreign connexions assumed in previous centuries by the old parties and permeated by the general culture which these had supported. Stern and uncompromising as the faith is, it was born in a country habituated to Parliamentaryism, highly gifted for compromise; and its leaders were undesirous of reform by revolutionary methods. Its leaders were not proscribed or persecuted into becoming another class, irreconcilable altogether to the state in which they lived; for the traditions and institutions of English political life, created very largely by the Liberal Party and its Radical wing, favoured fair play and tolerance. The system, in short, was not impervious to the new movement; this could live and thrive in the atmosphere on condition that it should sacrifice Time. Its leaders and organization have been such that Time was willingly sacrificed to avoid the tragic possibilities of destruction implied in revolutionary

activity. The essence of the Movement's policy was to admit the continuance of the present state so long as the possibility of its ultimate attrition was granted, and the necessary liberty allowed for progress towards the goal. From the first, the Labour movement not only recognized the inevitability of gradualness, but even its desirability. There has ever been a strong sense in English politicians, and, it may be said, in the people as a whole, that the material of the body upon which they are operating may be changed, wholly transformed, but it must not be destroyed: it is a recognition that, however great the claim for change, something is owed to one's opponents.

As a result, then, of Parliamentary traditions, political liberty, a sense of obligation to the existing social, foreign and Imperial commitments, and the existence of Trade Unions, even the infiltration of the Labour Party by members bred in the traditions of other parties, the Labour movement muddled into the most opportune path, namely the creation of a block of special Labour representatives in Parliament, to be supported by a federal arrangement among the Trade Unions, and Socialist Societies like the Fabian Society and the Independent Labour Party. Until 1918, then, the Labour Party was an electoral organization composed of representatives of various societies, but not of individual members, without an official body of doctrine, although it naturally drew this from extra-party sources, and from the I.L.P. and the Fabians. Its main concern was entrance into Parliament, when the old parties could be made to deliver immediate concessions to the working classes in return for votes. By 1918, the importance of the party had grown beyond this, and the aftermath of the War seemed to offer golden opportunities of social reconstruction. The old party system was badly shaken, if not destroyed, and the War had revealed all the defects of capitalist civilization. The party reformed its composition, and sought to state its aims in *Labour and the New Social Order*.<sup>1</sup> The reform of its composition was shown essentially in its appeal to workers 'by hand and brain', and by its admission of individual membership. It gradually established its own research and propagandist organizations, not relying as formerly upon the work done in these directions by the constituent Socialist bodies. However, the membership and weight of the party is still largely composed of the Trade Unions.<sup>2</sup> In this respect we observe a difference from the Continental and American Socialist parties. On the Continent there is a close connexion, because it is a frequent, though not a constant, occurrence, that a Trade Unionist is a member of the Socialist Party: but the parties are composed of individual membership organized by local committees

<sup>1</sup> Published in 1918.

<sup>2</sup> In 1928 2,025,139 members of Trade Unions were affiliated to the Labour Party (*Lab. Year Book*, 1929, p. 12).

mounting in a pyramid to the central conference and executive. A member enters as a Socialist, and not as a Trade Unionist: it is always an act of faith, not as often in England, a perfunctory incident of Trade Union membership. This has an important effect upon the policy of the parties: for, where Socialism leads the Trade Unions, only Parliamentary exigencies limit the scope of Socialistic doctrine and the speed of its realization; while when, as in England, Trade Union money and weight in counsel are so powerful, their own policy and prejudices must be respected and their membership not shocked. This, however, does not prevent the British Parliamentary Labour leaders, and the wise men of the party, from stating their aims in clear and uncompromising terms, though it causes qualifications which might otherwise not be made. The big contrast between England and the Continent is the small extent to which a comprehensive and consistent sociology has been made the basis of all minor deductions of policy and tactics, and, in especial, the blithe ignorance of the Marxian Theory, or its good-humoured pooh-poohing. Marx was indigenous to Germany, and his and Engels' works appeared in the German language decades before they became accessible to English readers. Perhaps the Germans are especially fond of a theoretical justification of their actions. But English politicians, as the English people generally, can always justify what they want in the process of obtaining it, or afterwards. The English politician is not a theorist but a man of action, acting with the few materials necessary for the burden of the day, and no more. When, finally, Marx was translated, his theories mastered and set on their way, the Labour Party had come under the leadership of those versed in two or three decades of Parliamentary opportunism, or those who were capable of a sound refutation of the gospel; and the men who have come under the domination of Marx are found outside the Labour Party, among the small band of Communists.

The Labour aims, then, consist of the fusion of two tendencies: the Radical tendency entering from the Liberal Party (the fundamentals of democratic government), and the Socialist tendency. It would not be, at this moment, too misleading to say that the tenets of the Labour Party consist of sincere Liberalism, with the addition of communal safeguards against the waste and miseries incidental to *laissez-faire* in the economic sphere.<sup>1</sup>

Who follows and composes the party? Not exclusively the proletariat, for many vote Conservative and Liberal in the towns, and large numbers in the country; but it is largely a proletarian body, that is, of wage-earners in industry and agriculture. It also attracts the subordinate ranks of the Civil Service, because it is favourable to State activity and bureaucracy, and declares those general principles

<sup>1</sup> Cf. *Labour and the Nation* (2nd Ed.), 1929.

of co-operation and social justice which a Civil Servant already spends his life in applying, and to which he is morally, by temperament and profession, a subscriber. Then there are members of both wealthy and middle-class families who are attracted by its general theory of perfectible society, with whom social justice is a strong passion, and who are the more firmly wedded to the party because they have the leisure and wealth to pursue and study argument, and even propaganda, as leaders, without being required to make any immediate sacrifice. To be able to enjoy the indulgence of one's own generosity and sentimentality, to give rein to an inspiration, and yet not to have to surrender anything, is a most pleasant career. A heterogeneous mass of followers has been collected by a number of special appeals: teachers are attracted by the emphasis placed upon education; pacifists by that on peace; queer social misfits take refuge with the new and hitherto pioneer party which contains so many eminent critics of life; young men from the Universities come for the thrill of social reform, and the ease with which power can be obtained; and many others simply because they think that 'something ought to be done', and the older parties seem to have done so little.<sup>1</sup>

The England for which the Labour Party appeals and works, is not an England which would be of benefit to the wage-earning class only; there are many other ideals in its philosophy attractive to the small salary-earning groups, and others also. Indeed, it is uncertain whether the working class would follow with such force and number if the full social vision of such men as Owen, Morris, Webb, Shaw, or Bertrand Russell already came within the range of practical politics, but it is because the party asserts that it stands for these things, and because its present fortunes and activity are at least the promise of a morally and aesthetically better world, that many follow it, who have no economic interest in its success. Numbers of Church of England parsons and curates are moving Labour-wards, since they believe that the ethics of the New Testament receive more heed in that party than in others; Quakers have long assisted its chief counsels as well as voted for it; and Nonconformity generally is tending rapidly away from Liberal to Labour. Roman Catholicism supports candidates according to the impression and promises they make locally: it tends, at present, to help the Labour Party in the poor districts since its congregations are in need of succour.<sup>2</sup> But suspicions of atheism and birth-control militate against a complete adherence. Poor Jews

<sup>1</sup> The members of the Co-operative Societies, that is, the female ranks of the proletariat, regarded from a consumer's standpoint, and the employees, also furnish a good contingent of voters and party workers. Cf. Hall, *Handbook for Members of Co-operative Committees*, 3rd Ed., Manchester, 1928.

<sup>2</sup> Cf. the Papal Encyclical of 1931, *Forty Years have passed*, and its fulminations against Socialists. Yet the Labour Party of Great Britain was treated more tolerantly than those of the Continent.

are generally friendly to the most 'progressive' party, not only out of economic interest, but because such parties have treated aliens generously, and have not insisted upon serious obstacles to their citizenship. But middle-class and richer Jews of the second generation tend towards Conservatism, hating the new arrivals or the poor because their manners remind them of their own origin; and often, they attempt to preserve the appearance of justice with the substantial security of their own status and fortune by posing as Liberals. The Jew has been particularly interested in, and affected by, the politics of the nation in which he is domiciled, but this has been more emphatic, especially for the Socialist movement, in Germany than elsewhere, a subject we shall touch upon in the discussion of German parties. In England ease of assimilation has reduced the hostility and offensive-defensiveness of the Jew to the vanishing-point.

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**The Effect of Power on Policy.** Some general considerations may be combined with our conclusions on the aims and principles of English parties. First, and of the utmost importance for the understanding of party tactics and organization, is the fact that every party has been continuously close to power, if not actually in power. This has resulted in apprehension of the two great obstacles to speedy advance to the ultimate logical destination indicated by the party's principles: difficulties inherent in administrative technique, and popular resistance to the way of the prophets. Hence, modification and deceleration along the independent routes, and all parties move with a real sense of the presence of others. There is a reduction of talk for mere effect either in Parliament or among the electorate, for such would soon be made ridiculous not only by one's opponents but by one's own experience. The harmonizing effect of Parliamentary life is discussed in the chapter on Parliaments. The sense of what is possible is very strong in all parties, and it naturally modifies any careless rapture, and also urges the parties to scientific research into the institutional technique of their own policies. 'Machinery' is their constant preoccupation: *how* can a policy be made to work? Can a machine be found to transform mere desire and undirected energy into tangible control of human behaviour? If not, the policy must be looked at askance—it is to be distrusted; there is something inherently wrong with it. At any rate, it is foolish to attempt to nail one's flag to a phantom mast; better to concentrate on substantial things which can be made to work. This is sometimes misleading as well as often healthily directive, for if it seems that machinery can be created, this is considered as a warrant for pursuing a policy; but human nature should be reckoned with, and, in fact, preoccupation with machinery often produces a superficial mind and judgement, and ultimate breakdown.

**Class and Party.** How far can English parties be called 'Class' or 'economic parties'? These two terms come almost direct from Marxian sociology, through the working men's colleges, and have gained currency since the advent of the Labour Party. They are more popular in Germany than in England. The term 'class' as Marx used it was extremely vague; it meant no more than one rather large group of people with interests and purposes different from and hostile to another; and this difference and hostility Marx saw in the whole of history ('since primitive communism') as the disruptive force, leading, by the clash of opposites, to a new state of society. Marx derived this philosophy of history by analysing social struggles through spectacles tinged with Economic Welfare, so that they were apparent to him only as struggles about wealth. Further, Hegelian dialectics taught him to seek for progress by the struggle of opposed forces. Finally, Marx detested the Capitalist System; and the wish for an alternative mastered his history. Thus was produced the argument expressed so clearly in Engels' *Condition of the Working Classes*, the *Communist Manifesto* of 1847, and later supported and applied in detail in *Das Kapital*. Thence issued the notion of class-warfare, which is explained clearly in this extract from Engels' Preface to the *Manifesto*:

'In every national epoch, the prevailing mode of economic production and exchange, and the social organization necessarily following from it, form the basis upon which it is built up, and from which alone can be explained the political and intellectual history of that epoch; that consequently the whole history of mankind (since the dissolution of primitive tribal society, holding land in common ownership) has been a history of class struggles, contests between exploiting and exploited, ruling and oppressed classes; that the history of these class struggles form a series of revolutions in which, nowadays (*observe!*) a stage has been reached where the exploited and oppressed class—the proletariat—cannot attain its emancipation from the sway of the exploiting and ruling class—the bourgeoisie—without at the same time, and once and for all emancipating society at large from all exploitation, oppression, class-distinction and class struggle.'

At the first heading 'Bourgeois and Proletariat', a footnote is added:

'By bourgeoisie is meant the class of modern capitalists, owners of the means of social production and employers of wage-labour; by proletariat, the class of modern wage-labourers who, having no means of production of their own, are reduced to selling their labour-power in order to live.'

The *Manifesto* proceeds that

'The proletariat will use its political supremacy to wrest by degrees all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state, that is, of the proletariat organized as ruling class'.

Now, if it be recognized that the economic motive is not the only one that causes men to create and contend, and if it be recognized that Bourgeois and Proletariat are only rough abstractions, that is, a significant part used to typify, but not to exhaust, the definition of the whole, then the term 'class' can be applied to political struggles conveniently and without error. Generally speaking, also, but only *generally* speaking, a party may be the organization of a class, or a number of parties may together contend on behalf of a class. But this is only generally speaking: and we have seen by analysis of the British parties that each contains adherents who are not there for economic or 'class' objects: and each advocates policies to satisfy human aspirations other than those which will enable it economically to exploit other people.

Criticism has, in recent years, concentrated upon the obvious errors involved in Marx's classification and prophecies. It has been pointed out that in modern industry and society a number of intermediate stages of economic existence and functions exist which belie the concentration into two,<sup>1</sup> and interests which seems to be antagonistic at first sight are in fact intimately connected.<sup>2</sup>

Hence the theory of the class basis of political parties has remained in the stubborn possession of the Communists alone. We must, however, admit a close though by no means perfect correspondence between a country and economic interests and its political parties. Of few parties in different countries can it be said that they are *purely* 'economic interest' groups as the Germans call them; still less will the term 'class' indicate the real nature of party struggles, although the attack and defence of property has become a large

<sup>1</sup> For example, Hyndman (*Economics of Socialism*, 1896, p. 94) showed that agriculture itself exhibited a triad of factors which would be and were often at odds with themselves. Macdonald (*Socialism and Society*, 1906, p. 113 ff.) pointed out how difficult to classify managers and the beneficiaries of such 'capitalist' enterprises as Friendly Societies, Building Societies and Co-operative Societies. Wells (*Russia in the Shadows*) has made an even more spirited attack upon Marx's categories than upon his beard, and Shaw (*Intelligent Woman's Guide to Socialism and Capitalism*, 1929) has disintegrated the classes by showing the mutuality which exists between the extremes of rich and poor and the groups intermediate. Bernstein, the German economist, (authorities *infra*), subjected the Marxian tenet to a minute and exacting criticism, showing that instead of the increase of riches on one side and the increase of poverty on the other, there was increased riches for all, an intermediate class growing up and uniting strongly and intricately the one extreme with the other.

<sup>2</sup> E.g., a textile worker whose interest would seem to lie broadly with the Labour party may, when it comes to Tariff Policy, find himself with the Conservative party—because the latter party favours tariffs which would protect the worker's interest and help to maintain a high standard of living. (Cf. Trade Union Congress, in 1930.)

We show later, pp. 540 ff., *infra*, that American parties are divided by sectional, that is to say, geographical interests; but, there again, we observe that between the sections there are connexions which are existent and strong, although not immediately apparent.



part of all politics, but more intensely of English and German politics. In the U.S.A. it is even more difficult to apply the class-struggle conception ; and in France we discover, as everywhere, how many issues of moment there are beside and beyond the economic struggle.

English Political Parties have been and are separated by the pursuit of vital but diverse truths. Their antagonism is real and sincere. None of the three parties is interplaceable with either of the others. All speak of their *national* mission, and argue that their doctrine will bring weal not only to the classes which are most obviously included in them, but to the whole country. Their plea is composed of the usual creation of an ideology in self-justification : we all feel the need to argue that our good is the universal good ; it is partly calculated propaganda, and partly our native and unavoidable blindness to all but the life which wells up from our depths into our fore-consciousness. And this is a quality shared by all parties in all countries. Divergence is plain and sincere in spite of the fact that the intensity of difference is not equally distributed among all members of any party, so that some are fully identified with extreme tenets, others are luke-warm, and others again approach the position of their nearest rivals.

A similarity has often been observed between the attitude of mind of extreme Conservatives and extreme Labour or Communists. It is based upon their common insistence that the community is the entity to which the individual must be subservient ; both demand obedience to standards set by authority. This similarity exists ; and the Tory and the Communist state, if established in all their extremity, would exhibit the same characteristics of *form* in such matters as obedience to the State, government from above and by experts, State officialdom, centralization. Here, however, the similarity would end. Nothing could be more distinct than the *objects* sought by the extremists, and upon every ideal served by the machinery of government the difference is as between day and night. On the other hand, Liberalism does offer a contrast in terms of machinery, for *laissez-faire* is not tolerated by its extreme opponents. Since Liberalism has not been able to govern by a programme entirely consisting of ' No ', and since even to say ' No ' is positively to judge, prefer, and decree, it has had to declare not only for certain means in government but for certain ends, and the ends are not so great a contrast to those of its opponents as the means ; and since the ends cannot be produced without their appropriate means even the doctrine and vindication of these has had to approximate to that of other parties. To approximate ; but not to lose its independent and unique character.

In passing to discuss the content of American political parties we shall not be entirely moving away from our discussion of English

political parties: the experience of each country illuminates the meaning of the others.

#### THE U.S.A.

When we consider the record of activity and the succession of programmes of the two great American parties, the Democratic and the Republican, we cannot observe any such definite and continuous divergence of mind as that which subsists between the English Liberal and Conservative parties. On the whole we might say that the Democratic embodies the Liberal tradition and the Republican Party the Conservative; but as soon as we have said this, such great modifications are necessary in the record of both sides that the generalization becomes misleading. One example will show the glaring difficulty of generalization—the Democratic Party sided with Slavery, the Republican Party fought it—which was Liberal and which Conservative? Nor can the generalization be reversed. If anything, that would be more untrue than the first: for the Democratic Party has a long and pronounced tradition of regard for the individual, local government, and peace among nations. But the Republican Party is not far behind this record, if at all, at the present time.

What generalization is nearest the truth, if we wish to compare American with English parties? It is this paradox, that *America has only one party, the Republican-cum-Democratic, divided into two nearly equal halves by habit, the contest for office, the Republican being one-half and the Democratic the other half of the party*. How can this be possible? The answer to this question shows that the paradox is based upon the peculiar meaning of the term 'party'.

Supposing that there is nothing to differ about, can there be parties? This is precisely what gives the American party system its characteristic peculiarities: that the objects of difference, the problems which call forth opinions and promote sincere and passionate opposition are fewer and less important than in any other country, excepting perhaps Switzerland.<sup>1</sup> The American political system does in fact start with its mind made up upon many subjects, which, in Europe, are the cause of endless difference and hostility. It is based upon a wide and unchallengeable consensus, upon an orthodoxy ubiquitous and passionately, if ignorantly, embraced.

The causes are plain. From the beginning the Constitution settled and withdrew from controversy a number of issues which in Europe have set fires burning. European parties have fought bitterly over the questions of Church and State, public education, freedom of

<sup>1</sup> It is a remarkable fact that most of the comprehensive studies of American Political Parties insist on their importance because they organize the voters and put forward candidates. The creation of a programme and the pursuit of an ideal are relegated to the distant background. Cf. Sait, *op. cit.*, and Brooks, *op. cit.*, p. 4.

opinion, property and the individual; the extent of democratic government and hereditary second chambers; monarchy, equality before the law; military service and standing armies. For America these questions were settled by the Federal and the State Constitutions. They are not entirely beyond the bounds of controversy, for the Constitution is amendable, but they have been religiously accepted by both the great parties; and slight alterations have not been worth their while, considering the difficulty of the process. Where public differences are liable to arise upon such matters, therefore, the plea of 'unconstitutional' strangles the impulse of the party, nor can it be in earnest or unrestrained in their advocacy. In fact, extra-party movements, and never a party movement, have changed the Constitution.

Next, in regard to the Federal parties, the Constitution, as a Federal contract, has excluded a vast field of human affairs and left them to the States. But such affairs as local government, the regulation of the suffrage, taxation, health, morals and peace, education, family relations, the regulation of commerce and industry, are precisely the centres of acutest controversy in other countries. The Federal system of America (this is not true of every Federal system without large qualifications) causes American Federal politicians to have very little to advocate, deny or defend. The party is therefore a kind of *cadre* or skeleton without spirit, flesh or blood. It stretches everywhere and touches nothing; it grasps at everything and leads nowhere. It cannot even base itself upon the substantial potentialities of the states' reserved and residuary powers, because the states have made unto themselves constitutions excluding important subjects from the field of politics, and their geographical and economic conditions are such that the party is obliged to 'straddle', in order to hold them together in a common allegiance. The term 'straddle', indeed, was brought into party terminology to express the act of *not* holding a view clearly and positively divergent from others; it means, indeed, having a leg in each camp, and not standing with both in your own; it means floating in the middle air because the camp has no firm soil.<sup>1</sup>

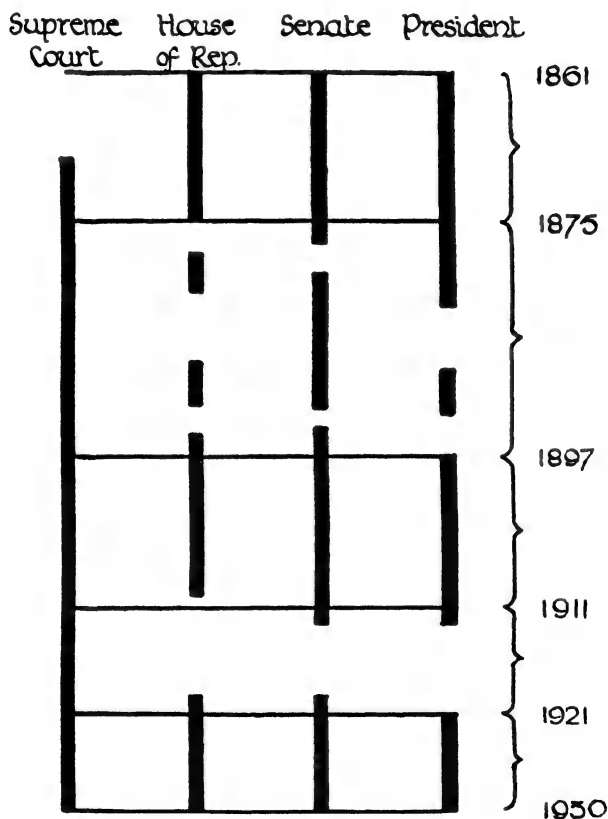
Next, the organization of government on the basis of the separation of powers results in stultification of any decided movement. The President whose election has been accompanied by the discussion of a 'platform' adopted by his party can only use his legislative authority (which is small) if the House and the Senate are stocked with members of his own party, for a sufficient length of time (which is infrequent

<sup>1</sup> The term 'straddle' is defined by Sait, *op. cit.*, p. 215, in such expressions as: 'to maintain an equivocal position'; to be 'vague and cautious' on any particular subject. Similarly in Brooks, *op. cit.*, p. 57: 'Platforms of the party (the Whig) became models of evasion, reticence and brevity as to issues.'

since there are elections of both bodies intermediate in his term),<sup>1</sup> and when it is so stocked if his party is agreed within itself and with him. These are rare events owing to the sectional differences in the country, the pretensions of leading senators, and the fact that the President's position is improvised and lacks any permanent significance, since the President is not a party leader before his accession to office, and at the end of his term retires into comparative obscurity. The Constitution has created all the conditions which destroy co-operation in politics, and tends to convert the personal and corporate

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## REPUBLICAN CONTROL OF THE FEDERAL GOVERNMENT



Note this diagram illustrates (a) the extent to which the Republican Party 'dominated the political scene' since 1861 (the black bars mark the years during which the Republican Party has been in power); and (b) the extent to which the several branches of the government were, at various times, in political dissonance. To be more exact in this particular, the lines should sometimes represent a precarious balance of parties in the legislature, and within each party.

The diagram is reproduced from Holcombe, *The Political Parties of To-day*, 2nd Ed. (Harper), 1925, p. 86, and continued to date.

conceit of membership of the various parliamentary bodies into pillars of public policy. Against this deliberate fragmentation the parties battle, and gain but a partial victory, for the Constitution does not allow them enough fuel for a complete victory. The Constitution divided in order that it might rule: and it succeeds. The parties are forced into mutual aid against its divisive power: the opposition sometimes helps the government against itself, in the hope that when its turn comes it will be helped, and in the knowledge that it must do something positive to show its constituents.

Nor is that all. The geographical, economic, and cultural features of America have gone further to reduce the number of political issues, and therefore the spiritual vitality of parties. Geographically, America is placed beyond the need of national assertion, of fear and hope, or alliance with others. After the wars of her infancy, and the out-purchase of possible enemies, issues which did split the country into real parties, the lands to the South and North of her were too weak or pacific to cause anxiety. From Europe she was weeks remote, and even now no army vast enough to cause her anxiety can be safely transported. All American foreign policy, until recent years, was a long-distance interest. Even her apparently intense interest in contemporary European affairs is largely the result of the educated man's interest—academic and detached—in issues mighty compared with the pettiness of his own country's domestic politics. But an alteration has set in: for America has discovered a problem in the South American republics, particularly Mexico, and has assumed Imperial obligations. To these we will revert in a moment.

Economically, the American nation suffers less anxiety than the countries of Europe. The proportion of people really badly off is much smaller, agricultural, industrial and commercial capital and income are widely diffused, and though there is a large number of millionaires this is not offset by intense misery. The bulk of the nation is middle class.<sup>1</sup> Even where there is poverty the sense of the adventurous and potentialities due to the fact that social and craft lines have not yet been too firmly drawn to be surmountable, the continued existence of opportunity and chance, reduce economic jealousy and discontent. Allied with this is American willingness to give new thoughts and new men a trial. There are still tremendous fields of industry and commerce to be exploited in a comparatively new country, with a small population—for America is in area over thirty times the size of England and its population is less than three times the size. There is, therefore, not so much pressure for any such fundamental change as is demanded by the Socialist Party, or even for such changes as are advocated by the Liberal Party of England, and if the members of the English Liberal Party were Americans

<sup>1</sup> Cf. Gregory, *Is America Really Prosperous?* *Economica*, 1929.

living in America it is doubtful whether their policy would be much different from that now advocated by the American parties. Industrial legislation has been declared constitutional within very narrow limits, wage-regulating machinery is of doubtful constitutionality. What, then, is there left for the parties to do ?

If, however, the contention between man and man in industry has given little impetus and material to the Republican-Democratic parties, that between one industry and another for protection by tariff has. And around this point party differences do revolve.

Are there not, then, differences of opinion about the Good Life—in terms of spiritual welfare ? There are.<sup>1</sup> One can observe many attitudes of revolt in matters of art, sex, religion, social behaviour, and yet their influence on politics is small owing to the fact that they are constitutionally outside politics, or are so well off (religions, for example, are endowed with thousands of millions of dollars) that they do not need either defence or subsidy from the State, or they are private and hidden because of the magnitude and intensity of social taboos. Prohibition of alcoholic liquor, that indulgence which for so many people was the cheapest and swiftest conveyance out of the drabness of unchosen reality, certainly stirred the stagnant pools of politics ; but only after a tremendous organization had been created outside political parties, and able as a united force to coerce them both.

**A Nation of Conformists.** The essential truth is that the Americans are a nation of Conformists. Out of the original Pilgrims who founded a State upon Nonconformity and the millions of others who fled towards spiritual and economic salvation, has grown a State dedicated to conformity—not an unpredictable result. But this great mass of over 100,000,000 people is not moved to conformity by common causes alone. The groups which compose it have each their individual character and aspirations which have had, until now, a common political result. We do not wish to enter into too lengthy an analysis of the American character, but we are obliged to say enough, at least, to support this generalization, and to make clear how far the future will be bound thereby. All save the poorest among the proletariat are sated by Plenty. The Fathers have solved many of their most difficult constitutional problems. For the vast majority the dollar is the chief mark of prestige, and is ardently pursued for the material joys, the immediate power and freedom, it buys. Little time is left for speculation on human destiny. Those who have but lately come to the New World are frightened by it : completely bewildered. Accustomed to villages and townships, to the smallest of modern social units, they have not yet learned to see the vast, humming, new complexity as a whole from the outside. They are satisfied if their own little bit is secured to them from despotism or

<sup>1</sup> E.g. Stearns (ed.), *Civilization in America*.

revolution. All things are in a state of experiment, or people think of them so, because they are new,—the universities, the schools, the tariff, the great industries, the growing townships, life in big towns, numerous statute-books, the civil service, new ideals and political associations—all are in a state of experiment, and, in awaiting the result, one must conform, see, be seen, and not heard. All these things are the vulnerable foundation of prosperity, and a critical remark may kill them. It is one's duty, therefore, to 'boost' all ventures. One may, with impunity, set out on a new trail, but the existent trails must be respected. Soothsayers, prophets and panaceas are welcome so long as they amuse and excite, but they must not incite. Then America is the land of village Main Streets peopled by Puritan or foreign agriculturists or small traders, their minds either dominated by the fear of their neighbours and the harsh empty commandments of Nonconformist pastors, or excised by the Roman Catholic Church. In the towns the large contingents of the foreigners including the Irish and others from the British Isles, are too unsure of their footing and environment to utter any lively dissent. They are well pleased with the 'vast drysaltery' into which they have strayed. Seemingly afraid to differ, the Anglo-Saxon stock have created other religious adjuncts, like the Y.M.C.A., and the grown-up boys' clubs, like the Rotarians, Elks, Kiwanis, and others, to foster the same conformity and narrow-minded obstruction to reform. Prosperity and good fellowship are ardently desired in this new land, among these otherwise lonesome adventurers, cut off from familiar surroundings and the support and pride of ancestral memories. No words are more common in the U.S.A. than 'group' and 'service'. The 'group' is the American's ideal form of activity, and he is lost and afraid without it, while 'service', with its motto of 'others before self', the claptrap of every salesman and every church, is the veil drawn over one's own individual nature and desires, as though there were something of which to be ashamed or afraid. The language of religion, as of politics, is 'Why not dwell on the good points? You will do so much more good to people if you make them see how much good there is in the world!'

Over all there is the strong influence of the great movement of pioneers who converted one frontier after another into settled territory and bound up their fate with their own precarious creation. Effort, creation, conquest and conservation were the phases of this process—and the last phase is not yet ended. The spirit of this frontier-conquest had two components—one, flight from the culture and society which had ceased to give opportunities, and the other, co-operative individualism to win and preserve fresh soil. The first, undertaken to avoid the effort of reform, decreased dissent: it offered it an outlet and thus dissipated it; the second, again, put the com-

monality over the individual. These two consequences of frontier-control still mentally operate, and instead of dissent appearing within the parties, it makes a pilgrimage outside to found new ones; and these are always based upon closely associated activity, the individuals in which are linked by a fresh Mayflower pact. Moreover, to the pioneer mind it was dangerous to think beyond the immediate obstacles: all was staked upon to-day and to-morrow. And the whole of America is at present a frontier. Its vast possibilities have been plumbed by no one. Its experience is too short to judge that the roads taken are clear or the buildings sound. There is so much uncertainty about life—though hopeful uncertainty—that one must needs fly to the securest refuge: the applause of each other, a collective shutting of the eyes lest faith dissolve, and the nailing, buttressing activities of churches, with their seeming clarity of doctrine.

Who, indeed, can possibly grasp and present the qualities of this frontier. Frontier? No, a thousand! a hundred thousand frontiers! In 1790 the population was about 4 million, and the area 892,000 square miles; in 1850 the population was 24 million, and the area nearly 3 million square miles; in 1880 the population was 50 million, and the area over 3 million square miles; in 1928 the population was more than 120 millions.

This State covers a whole continent. No single party can possibly comprehend all its diversities: the attempt would break it to pieces. And if the party, in spite of this, seeks to enlarge its sway, it can only do so by raising no issues. As it stretches it empties. The instinctive answer of people and party to any territorial and cultural expansion of this kind by the people involved in it is, Beware! Let us forget our differences! But the consciousness of power implied in the conquest of the wilderness is causing the American people to advance to the conquest of spiritual frontiers; so intense is this belief in human power that already they seek the conquest of Heaven: we must not forget or minimize the burning faith of the Prohibitionists or the various societies for good government. But these are only the first treks and outspannings. Conservatism and conformity are dominant.

While all these factors make for political indifference, both in the sense of lack of interest and lack of controversy, another has powerfully deflected the mind from that meditation upon the ultimate good which issues in diversity of outlook. It is the influence of machinery. American civilization is so much the product of machines and machine-made commodities that the mind is directed to inquire not so much into the virtue of the product, as the efficiency of the tool, and the excellence of the machine becomes a purpose in itself. The American has a morbid interest in 'technique'. Nor is this a product of the mind of the average man; the educated are quite as prone to think



in terms of 'technique' and the 'approach' rather than in terms of ends. The American language is full of the spirit of machinery; but its most characteristic word is 'to fix'.<sup>1</sup>

All this is merely indicative of the everywhere observable quality of American life—the ultimate contentment with the construction and operation of little devices to make life easy. Students of law and politics in America are every day becoming more familiar with Dean Pound's phrase 'the engineering theory of law'; by which, is meant, that the contemporary world states juristic problems in the terms of the engineer. The American scene makes this possible and even desirable, for to speak and be understood we are obliged to borrow our idiom from the compelling forces of the time, and the America which impresses the man is the land of cranes, pulleys, girders, bridges, steel scoops, things made to make others, intricate and delicate things created and destructible in a few days; and these are to the mass of Americans what the ancient historic immovable forces of Europe are to its people, the vital basis of workaday religion. Their products are the same, 'standardized'; the discipline, or restraint implied in all religions, is the same: a common obedience to the machine, the entirely rationalized machine, whether it is of metal and wood, or of human beings consigned to places in a scientific pattern and order. The cinema is a most powerful machine of uniform culture; the churches are as concerned on Thanksgiving Day with the number and causes of bankruptcies, as with moral philosophy. But the system as such is accepted. The conspiracy is open and vociferous; and though it is largely fostered by the desire to be very well off, to go rung by rung from one neighbour to a higher one until that distant million-dollar peak is some day reached, the sheer mass of the machinery hypnotizes the individual into complicity. These are America's real temples.

I have not said all about the American that can be said, nor all that ought to be said, but enough, only to explain its conformity and its party. Other aspects of American character, some of which we have touched upon, the obverse of those which cause conformity, have resulted and do result in internally bitter animosity and organized challenge, but the challenge of *parties*, that is, organization seeking for an all-round command of the State, gives way to the challenge of groups and associations for single specific measures.

<sup>1</sup> The verb 'to fix' is used in a number of senses alien to English and continental custom. An American girl 'fixes' her hair, while in England she 'does' or dresses it. An impromptu meal is in England merely 'served', but in America it is 'fixed up'. An Englishman may be rich or well off; the American is 'well fixed,' while in England or on the Continent business men or politicians 'arrange' deals or compromises, their American prototype 'fixes' them. Revenge is in Europe visited by getting people into trouble or making them suffer, and victims are paid out or punished—in America they are 'fixed'.

It is clear that not all the factors we have touched upon are fixed upon America with the unshakeable permanence of destiny. Some are alterable ; but time will pass until their force is spent, and for a generation, at least, those we have analysed are bound to produce their consequences.

\* \* \* \* \*

There is a singular lack of continuity in the development of American parties : the two main divisions reform several times in 150 years, and every second decade witnesses the rise and decline of eager third parties on their fringes. The present American system is based on the chief division into Republican and Democratic parties ; these arose after the Civil War and their character has been mainly determined by the men and the environment since 1865. Although they are tinged and affected by the spiritual experiences of the Civil War and its aftermath, they variously serve themselves to the ideals of the party leaders in the early years of the Republic, the Democrats profess to find nourishment in Jefferson, the Republicans in Hamilton. These two parties hold the field ; there are other parties,<sup>1</sup> but their Presidential and Congressional poll has never been as much as 10 per cent. of the total, and in the Presidential election of 1928 they polled only a quarter of a million votes.

Party divisions first appeared during the constitutional convention of 1787 and the campaigns to ratify the constitution. They were given body and determination when the constitution began to be applied. Until 1828 (when Andrew Jackson was chosen President) the spirit of Thomas Jefferson struggled with the spirit of Alexander Hamilton, the first was embodied in the Democratic Republican Party, the second in the Federalist Party. Two general attitudes were confronted, rather like the English antithesis of Liberal and Conservative, and they are well exemplified in Jefferson's friendship for France and the Federalist friendship for England during the war between these two powers. Also in the strict construction of the constitution by the Democratic Republicans, designed to limit the power of the Federal authority, and liberal construction by the Federalists, who wished the constitution to enjoy a developing life of its own. Who followed these leaders ? Jefferson was followed, broadly, by those who had been hostile to the establishment of the Federation, the Southern planters, the grain growers, the small tradesmen ; <sup>2</sup> Hamilton by the creators of the Constitution, the merchants, the bankers, the shipbuilders, principally located along the North Atlantic Coast. Here was at once revealed, though it was always latent, that mingling of idealism and attention to immediate economic

<sup>1</sup> Fine, *Labor and Farmer Parties in the U.S.A., 1828-1928* (1928).

<sup>2</sup> Cf. Beard, *Economic Origins of Jeffersonian Democracy* ; Holcombe, *op. cit.*, Chaps. I, III, V ; Bowers, *Jefferson and Hamilton*.

interests which is characteristic of all parties, but which in the U.S.A. is especially conspicuous, because the immediate economic interests are emphasized and sharpened by the size of the country and the variety of its climate and economic pursuits, and they are neither tameable by a consensus of ideals nor easy of propitiation by compromise.

Power swayed between these parties until Jefferson's organization of the rural grain-growers overcame the combination of other elements, and Andrew Jackson in 1828 repeated this feat and in addition won the egalitarian West,<sup>1</sup> the economic and spiritual opponents of the merchants and bankers of the East. Affecting the issue always were the person and achievements of the leader : Washington's reputation was able to give lease to the nationalistic 'strong' governmental and financial projects of Hamilton, and perpetuate the party under John Adams ; while Jefferson and Jackson by their own mentality and demeanour were able both to promise the interested their satisfaction, and cause others to follow them regardless of immediate utilities : chief ingredient in their success was their sympathy with the hard lot of the poor.

Nor ought we to lose sight of one other permanent aspect of the American party system which was now revealed. The party in opposition (in this early case the Jeffersonian) is 'strict constructionist', that is to say, it agrees that the constitution lays down rigid and narrow limits to the activity of the government ; while the party in office, whether Jeffersonian (after a period of opposition) or Federalist (as in this early case), is 'liberal constructionist', that is, it argues that the government has the right to do everything which the constitution does not expressly deny, that is, that it is proper to do what the constitution implies, that which is 'necessary and proper'.<sup>2</sup> On the whole, the Federalists were the 'liberal constructionists', their friend on the bench of the Supreme Court was Chief Justice Marshall ; but, going into opposition in 1812, they became 'strict constructionists', seeking in constitutional interpretation the political power they were denied in the country. Their spiritual successors, the Republican Party, have been 'liberal constructionists' when immediate necessities required it ; their spiritual opponents, the Democratic Party, arrived under President Wilson, at a singular elasticity in their doctrine and practice of 'liberal construction'.

From Jackson's entry into the Presidency in 1828 until the great dissensions and party reorganization of the Civil War period politics revolved around the respective claims of the West and the East to the economic ministrations or forbearance of the Federal authority : the issues were internal improvements like roads, canals and rivers ;

<sup>1</sup> Cf. Bowers, *The Party Battles of the Jackson Period*, Boston, 1922.

<sup>2</sup> Cf. Morse, *Parties and Party Leaders*, Boston, 1923.

the United States Bank, and the tariff. The first was supported by the Democrats, since they benefited the new states of the interior; the National Republicans, the contemporary organization of the north seaboard states, opposed. The second caused one of the most famous constitutional conflicts in the history of the U.S.A. The bank, the favourite child of Hamilton, had always been unpopular with the farmers and the poor of the cities, and promoted and applauded by the wealthy, business sections. Not without difficulty had the bank been maintained: *McCulloch v. Maryland* is an evidence of the strength of the opposing forces. When societies of primitive minded people like those of the West and some parts of the South come into contact with the complex monetary and credit arrangements of modern civilization they believe that they will be cheated: and their belief acquires special force when, in fact, as in the western states, banks are established without proper safeguards upon their operations. This natural but ignorant resentment found vent in a strong prejudice against the U.S. Bank. This was translated into the ideology of democracy against monetary monopoly, and the welfare of the many against the welfare of the few shareholders of the Bank. Jackson's message of veto of the charter of the Bank in 1832 sets the tone of the Democratic Party of the time against the National Republicans:

'Every monopoly, and all exclusive privileges, are granted at the expense of the public, which ought to receive a fair equivalent. . . . Is there no danger to our liberty and independence in a bank that, in its nature, has so little to bind it to our country? . . . If we must have a bank with private stockholders, every consideration of sound policy, and every impulse of American feeling, admonishes that it should be *purely American*. . . .'<sup>1</sup>

Now, thirdly, there loomed up sectional issues destined to split the Democratic Party. In a country where there is at once no centrally controlled economic policy yet a vast area with diverse products, and a *tariff policy*, the scramble for protection, in the known state of human nature, must necessarily be fierce, for each section will seek the fullest exploitation of its own resources, even if this is detrimental to his national colleagues in other parts of the country. Little by little a gulf yawned wide between the South Eastern planters' interests, and the industrial and mercantile North and the cluster of new interests like the wool, hemp and flax growers of the middle states. The former, as a block of planters of cotton, which had become a great industry needing free access to markets abroad and cheap manufactured articles at home, were seriously perturbed by the consequential discrimination against them, had after a solemn protest against the

<sup>1</sup> Cf. Macdonald, *Select Documents illustrative of the History of the United States, 1776-1861*, New York, 1909, pp. 261-8.

'tariff of abominations' of 1828<sup>1</sup> supported Jackson's presidential candidature, for he himself was a slave holder and in tariff matters moderate. Indeed, Calhoun, his vice-president, was the direct personal representative of this *bloc* of Jackson's supporters. They received little relief; and the issue of nullification and secession arose. Their cause was economic:<sup>2</sup> the utterances were in the language of idealism and constitutional law: whether the Federal or the State authorities were sovereign.<sup>3</sup> The Democratic Party suffered a personal split, Calhoun resigning the vice-presidency, but was saved by the diplomacy of Jackson<sup>4</sup> and Henry Clay,<sup>5</sup> who at once urged the sacredness of the Union and lowered the tariff in favour of the South.<sup>6</sup>

The Jacksonian Democracy's other titles to idealism and achievements were its identification with the Western supporters of manhood suffrage, and its establishment of the 'spoils' system on the twin

<sup>1</sup> Cf. in Macdonald, *op. cit.*, *Protest of South Carolina against the Tariff of 1828*, Dec. 19, 1828, para. 7, 8 (p. 233): 'Because, even admitting Congress to have a constitutional right to protect manufactures, by the imposition of duties, or by regulations of commerce, designed principally for that purpose, yet a tariff, of which the operation is grossly unequal and oppressive, is such an abuse of power, as is incompatible with the principles of a free government, and the great ends of civil society, justice, and equality of rights and protection.'

'Finally, because South Carolina, from her climate, situation, and peculiar institutions, is, and must ever continue to be, wholly dependent upon agriculture and commerce, not only for her prosperity, but for her very existence as a State; because the abundant and valuable products of her soil—the blessings by which Divine Providence seems to have designed to compensate for the great disadvantages under which she suffers, in other respects—are among the few that can be cultivated with any profit by slave labour; and if, by the loss of her foreign commerce, these products should be confined to an inadequate market, the fate of this fertile State would be poverty and utter desolation—her citizens, in despair, would emigrate to more fortunate regions; and the whole frame and constitution of her civil polity be impaired and deranged, if not dissolved entirely.' See also the *Protest of Georgia*, Dec. 20, 1828, which follows on p. 234 ff.

<sup>2</sup> They were produced also, and indeed, immediately by the proposal of Senator Foote of Connecticut in 1830, to limit the sale of public lands in the West. The sale took away from the labour reservoir of northern manufacturers and they were therefore desirous of its limitation; the southern planters were not displeased to link hands with a large agricultural population: they could form a block with them to overcome the North in Congress. The Hayne-Webster debates were the immediate result. The yeast of these debates was the economic struggle.

<sup>3</sup> Cf. the Hayne-Webster debates on Senator Foote's Resolution in January, 1830, in Macdonald, *op. cit.*, p. 239 ff., and the *South Carolina Ordinance of Nullification*, 24 Nov. 1832, on pp. 268-9: 'Whereas the Congress of the United States, by various acts, purporting to be acts laying duties and imposts on foreign imports, but in reality intended for the protection of domestic manufactures, and the giving of bounties to classes and individuals engaged in particular employments, at the expense and to the injury and oppression of other classes and individuals, and by wholly exempting from taxation certain foreign commodities, such as are not produced or manufactured in the United States, to afford a pretext for imposing higher and excessive duties on articles similar to those intended to be protected, hath exceeded its just powers under the Constitution,' etc., etc.

<sup>4</sup> Cf. *ibid.*, p. 283, *Jackson's Proclamation to the People of South Carolina*, 10 Dec. 1832.

<sup>5</sup> Cf. Schurz, *Henry Clay*, 2 vols., Boston, 1899.

<sup>6</sup> The terms are in Macdonald, *op. cit.*, p. 284 ff.

bases that it served the party and that, since one man was as good as another, offices ought to rotate. However, let us not attribute to the Democratic Party an exceptional interest in 'spoils'.<sup>1</sup> The 'merit' system had a bi-partisan origin and a bi-partisan application.<sup>2</sup>

The opposition to Jackson, the National Republicans, from 1834 called the 'Whigs',<sup>3</sup> was composed of a heterogeneous number of elements: (1) The nucleus of National Republicans, that is, the North Eastern protectionists, national Bankers, and supporters of internal improvements; (2) nullifiers (great tobacco and cotton planters) and extreme state's rights advocates (yet Webster was in its ranks); (3) a majority of the anti-masons, a gesture against masonic excesses, and without any other foundations; (4) miscellaneous dissentients from Jacksonian policy and aggressive demeanour, on grounds of 'spoils', public and personal, and general constitutional doctrine. (Calhoun, for example, had joined it until 1840.) The doctrine and vitality of this party resided in the first group, and that was clear enough,<sup>4</sup> but to hold the other elements in line for Whig candidates it was necessary to 'straddle', that is, to say nothing in seeming to say much.<sup>5</sup>

Both parties were destroyed by the slavery issue; the Whigs in 1852 by their policy that the Fugitive Slave Law was final, that the system was 'essential to the nationality of the Whig party and the integrity of the Union',<sup>6</sup> and the Democrats in 1860.

Here is another of the characteristics of the American party system: That the ordinary two-party system is so precarious a balance of interests and adherents, and is so difficult to establish and maintain over a continental area of pronounced diversities, that neither party can initiate a vital new policy without grave jeopardy to its existence. What it cannot do, third or single-issue parties must do. Thus with slavery and the rise of the abolitionists;<sup>7</sup> so with Bimetallism,<sup>8</sup> so with Civil Service reform, so with Prohibition,<sup>9</sup> so with Woman Suffrage.<sup>10</sup> The movement which William Lloyd

<sup>1</sup> Cf. Fish, *op. cit.*, for the beginnings of the spoils system.

<sup>2</sup> Cf. Thomas, *The Return of the Democratic Party to Power in 1884*, and Foulkes, *Fighting the Spoilsmen*.

<sup>3</sup> The name was taken in order to denote the struggle against executive usurpation, since it had been the name of the anti-British party during the War of Independence. Cf. especially, Macy, *Political Parties in the United States, 1846-61* (1900).

<sup>4</sup> Cf. Woodburn, *Political Parties and Party Problems in the United States*, New York and London, 1914, p. 48.

<sup>5</sup> Cf. Stanwood, *A History of the Presidency, 1788-1897*, Boston and New York, 1898, p. 180.

<sup>6</sup> Brooks, *op. cit.*, p. 58.

<sup>7</sup> Cf. T. C. Smith, *Liberty and Free Soil Parties*.

<sup>8</sup> Later in the century (broadly from 1873-96) the 'Silver Party' fought for the free coinage of silver. The 'Greenbackers' were another party favouring unlimited coinage of silver.

<sup>9</sup> The Prohibition Party and the Anti-saloon League.

<sup>10</sup> The National American Woman Suffrage Association and the National Woman's Party.

Garrison had begun in 1831 produced an American Anti-Slavery society. It won adherents as the question was ever in issue with the admission of more states into the Union. By 1848 the National Free Soil Party had gathered large forces in the North, East and West from the following of the major parties. The repeal of the Missouri Compromise in 1854 abolished the rule that slavery would not be tolerated north of the given line. The Republican Party almost immediately arose on the 'Free Soil' foundation. To the original propagandists against slavery the issue appeared in the light only of an ultimate ideal of human conduct :

'Congress has no more power to make a slave than to make a king; no more power to institute or establish slavery than to institute or establish monarchy; . . . that we accept the issue which the slave power has forced upon us; and to their demand for more slave states and more slave territory, our calm but final answer is: No more slave states and no more slave territory.'

The Fugitive Slave Act was to them 'repugnant to the spirit of Christianity, and to the sentiments of the civilized world. We therefore deny its binding force on the American people, and demand its immediate and total repeal'.

The growth of the Republican Party (in 1856 it carried all the New England States, New York, Ohio, Michigan, Wisconsin and Iowa) was, to the South, an earnest that slavery was to be destroyed. They became extreme, and in 1860 split into Southern Democrats and Northern Democrats, who were in favour of leaving the issue to each separate state. Fragments of old parties and adherents of the new swung into hostile lines: the old compromises had worn out; the Union was broken and the parties were, therefore, sectionalized.<sup>1</sup> Until the full onset of the slavery issue both parties had had adherents all over the country: they certainly had their peculiar and impregnable strongholds, but they were not confined to those sectional strongholds.

'The Whigs, like the Democrats, were able to win seats in all parts of the country. On the whole, however, they were most successful in the North-East. They were less successful in the Upper South, still less so in the North-West, and least successful in the Lower South. On the other hand, the Democrats were much stronger in the North-West than in the North-East, and in the Lower South than in the Upper.'<sup>2</sup>

Broadly the Whigs were supported in the South by the rich, whether planters or men of commerce, 'the aristocrats of the fertile black belt,' and in the West their American system of encouraging the home market and promise of credit facilities found them considerable support.

<sup>1</sup> Cf. Von Holst in Wilson, *Division and Reunion*, p. 212.

<sup>2</sup> Holcombe, *op. cit.*, p. 145, and cf. his statistical analysis, *loc. cit.*; Cole, *The Whig Party in the South*, pp. 69, 71, cited in Holcombe, *op. cit.*, p. 147.

In the North-East and in the North-West the grain growers and pioneers supported the Democratic Party, for both its general theories of human rights and its particular ministrations in terms of westward expansion, cheap land, low taxes.

This balance of interests was upset by the exodus of the small farmers of the North and West from the Democratic Party upon the passage of the Kansas-Nebraska Bill which repealed the Missouri Compromise<sup>1</sup>—for the farmers feared an inrush of slaves and a limitation of their own opportunities; and the tearing of both parties in the Congress which enacted the Act—Southern Democrats and Southern Whigs opposed Northern Democrats and Northern Whigs.<sup>2</sup>

The Democrats, who had begun as the party of Jefferson, the veritable apostle of 'liberty, equality and fraternity', were now fighting a sectional battle whose programme consisted (a) of the denial of liberty, equality and fraternity to the black race<sup>3</sup> and (b) assertion of the rights of self-determination; the Republican Party which now arose to fight the battle of the North and West against the South, derived from Hamiltonian origins, denying the equality of man, asserting the need for obedience and hierarchy, but it now urged the paramountcy of equal liberty, and as a partner thereto, the inacceptability of secessionist doctrine; in the latter only was it true to its origins—the new environment, the development of the frontier and its opportunities, and the adhesion of idealists had made it, for the nonce, at any rate, quite Jeffersonian in character.<sup>4</sup> But the emancipation policy of the Republican Party was not established or carried through without serious domestic friction and considerable dissent.<sup>5</sup>

<sup>1</sup> Holcombe, *op. cit.*, p. 157; Woodburn, *op. cit.*, p. 93; Beard, *The Rise of American Civilization* (1928), II, 13 ff.

<sup>2</sup> '... it is clear that many thousands of Democrats had broken the habits of a lifetime and brought about a radically new alignment between the major parties. In all those states, both in the north-east and the north-west, where the Democracy had been most firmly entrenched in power in 1852, the Republicans had become by 1860 the dominant party. The majority of the small farmers, which had formerly been Democratic, not only in what might then have been called the hay-and-grain region (which by 1920 had become the hay-and-pasture region), but also in the distinctively corn-and-wheat regions north of Mason and Dixon's line and the Ohio river, had become Republican.'—Holcombe, *op. cit.*, p. 175.

<sup>3</sup> 'The Democracy of to-day hold the liberty of one man to be absolutely nothing, when in conflict with another man's right of property; Republicans, on the contrary, are for both the man and the dollar, but in case of conflict the man before the dollar.'—Letter of Abraham Lincoln (1859) cited in Holcombe, *op. cit.*, p. 169.

<sup>4</sup> 'The principles of Jefferson are the definitions and axioms of free society. And yet they are denied and evaded with no small show of success. . . . All honour to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document an abstract truth, applicable to all men and all times, and so to embalm it there that to-day and in all coming days it shall be a rebuke and a stumbling-block to the very harbingers of reappearing tyranny and oppression.'—Lincoln's Letter (*contd.*), *ibid.*, p. 170.

<sup>5</sup> Cf. W. A. Dunning, *Reconstruction*.



Since the rise of the two great parties in the circumstances we have indicated the issues have been largely the same as they were in the period up till 1854 : namely a number of specific and isolated economic problems which have attracted aggregations of various national sections. The fierceness of the Radical Republicans in following their victory by legislative, administrative and military coercion of the South, naturally put the Democrats in the position of attackers of tyranny, and made them the critics of the administrative abuses which preceded the reform of the Civil Service, and the rotten condition of political morality exhibited by a party which had done its job and contrived only to exploit it in such terms as the surreptitious increase of Congressional salaries in 1874.<sup>1</sup> Down to the War of 1914 the Democrats took the more liberal and generous side of the issues which arose : They favoured the small and weaker interests of society against the stronger, that is, those who lived by agriculture in the South and West,<sup>2</sup> hence they took the Bryan stand in the monetization of silver controversy against the Republican insistence upon ' sound money ' ;<sup>3</sup> they protected those who ran small businesses against those who lived by large industry, by their advocacy of trust-controlling measures ;<sup>4</sup> they favoured the freedom of the small nations against the use of Imperialistic power on America's part, in the Spanish-American War ;<sup>5</sup> they promoted the sincerity of elections by the advocacy of government control of campaign funds ;<sup>6</sup> they reduced the Tariff in 1894<sup>7</sup> and 1913.<sup>8</sup>

In all these matters the Republican Party eventually (save in

<sup>1</sup> A very good account of the issues or lack of issues of the time is to be found in H. C. Thomas, *The Return of the Democratic Party to Power in 1884*.

<sup>2</sup> During the period 1872-96 the main conflict between the two parties centred around the ' silver ' question and the level of tariffs. The Republicans resisted silver inflation and the Democrats fought for a lower tariff. But on other questions, for example, civil service reform, there appeared frequently to be only a difference of emphasis. For full details of the party policies see Stanwood, *History of the Presidency, 1788-1897*, where the party platforms are reproduced. Cf. for this period, importantly, Stephenson's *Aldrich*.

<sup>3</sup> Cf. Buck, *The Agrarian Crusade*, New Haven, 1920 ; Beard, *Contemporary American History*, New York, 1914 ; Schlesinger, *Political and Social History of the United States*, New York, 1925, Chap. XXIII.

<sup>4</sup> Cf. Beard, op. cit. ; Schlesinger, op. cit., pp. 471, 472 ; Morrison, *History of the United States*, 2 vols., London, 1927, II, 434 ff.

<sup>5</sup> Cf. Beard, op. cit. ; Schlesinger, op. cit., p. 420 ; Stanwood, op. cit.

<sup>6</sup> Stanwood, *History of the Presidency*, Vol. II, 1897-1916, Platforms of 1908, 1912, pp. 186, 350.

<sup>7</sup> By the Wilson Act of 1894, wool, lumber and copper were placed upon the free list. There was a reduction of duties on a number of protected commodities, e.g. pig-iron, steel, tin-plate and chinaware. The average level of duties was reduced by about 10 per cent. (The 2 per cent. income tax on all incomes over \$4,000 was later declared unconstitutional by the Supreme Court.)

<sup>8</sup> By the Underwood Act of 1913 the list of free imports was extended to include wool, iron ore, etc., agricultural implements, etc. Reductions in the higher duties (woollen and cotton goods) were enacted. The average level of duties was about 30 per cent. as compared with 39.9 in 1894. For further details cf. Bogart, *Economic History of the American People* (Longmans), 1930, pp. 702, 703.

regard to tariff) competed with the Democratic Party, but only upon pressure, and it only entered upon a vigorous policy of aid to the weaker elements in society through its own Progressive, insurgent group under Roosevelt <sup>1</sup> and La Follette, <sup>2</sup> that is, believers in the doctrines of the Western States. Yet the Democratic Party served the ideals of centralization in its establishment of the Federal Reserve Board and the Federal Trade Commission, and through President Wilson a very 'liberal constructionist' <sup>3</sup> view of the constitution, a view which, however, was shared as much by Roosevelt. The Democratic Party tried hard to keep out of entanglements with Mexico and the European War; the Republicans have shown a special interest in the 'big stick' policy, preparedness. The Democratic Party, under Wilson, had a plan of world peace in the League of Nations: while destroying this the Republicans have sought the way of special arrangements like the Kellog Pact and the London Naval Agreement. <sup>4</sup> Two matters which were very definitely not of *sectional* importance had to be forced upon the parties before they would act—Prohibition and the Woman Suffrage. By 1900 the Democrats were talking in terms of Jeffersonian ideals, while Republicans found a new interest in the doctrines and personality of Hamilton. <sup>5</sup>

Where were and are the strengths and weaknesses of these parties? In 1896 the Democratic strength lay solidly in the Lower South; <sup>6</sup> it had a 50 per cent. majority over the Republicans; in the North-west <sup>7</sup> the Republican Party was nearly four times the strength of the Democrats; in the North-east <sup>8</sup> it had almost nine times the representation of the Democrats. The Democrats suffered now and until the Republican split of 1912 from the loss of the following of the small farmers of the North-east and North-west which occurred at the Civil War. <sup>9</sup> The Republicans seemed to have a solid following in the North and West, but in New York and New Jersey, and in the Far West and the Central States the interests which sought benefits were only closely divided. Could this be turned to the advantage of the Democrats by superior bidding or a split among Republicans—then Republican strength was sapped, and even if this occurred the recapture of unity

<sup>1</sup> Cf. Roosevelt, *Autobiography*, 1913; B. P. De Witt, *The Progressive Movement*, New York, 1915.

<sup>2</sup> Cf. Beard, *op. cit.*

<sup>3</sup> Cf. Wilson, *Congressional Government in the United States*; Tumulty, *Woodrow Wilson as I Know Him*; *Public Papers of Woodrow Wilson*, ed. by R. S. Baker and W. E. Dodd, 2 vols. (Harper), 1927.

<sup>4</sup> Cf. Adams, *A History of the Foreign Policy of the United States*, New York, 1924; Howland, *Survey of American Foreign Relations*, 1928, New Haven and London, 1928.

<sup>5</sup> Cf. Holcombe, *op. cit.*, p. 252.

<sup>6</sup> Cf. *ibid.*, Table, p. 240. Stanwood, *op. cit.*, Chap. XXXI.

<sup>7</sup> Holcombe, *op. cit.*, p. 240.

<sup>8</sup> *Ibid.*, *loc. cit.*

<sup>9</sup> *Ibid.*, p. 245.

and success here by the Republicans would bring them national success. Such a split occurred overtly in 1912; it was overcome in 1920. In 1912, the Progressives of the West broke with the conservative Republicans of the East because these were conceitedly giving rein, after their victory over Bryan's silver campaign, to capitalization and Hamiltonianism.<sup>1</sup> Further, dissension arose from the economic policy pronounced by the party: the tariff of 1897 was highly protective and favoured the Eastern manufacturers and the farmers of the West; no attempts were being made to render the trusts, like the meat-packing industry and the railways, amenable to public control, a matter of vital interest to those who were being made to pay more than the traffic could bear.<sup>2</sup> Although Roosevelt and Taft advanced in these directions resentment could not but grow if the spirit in which reforms were undertaken were that of Taft.<sup>3</sup> By 1909 when the Payne-Aldrich Tariff was passed<sup>4</sup> the number of interests requiring conciliation were too large for the satisfaction of all,<sup>5</sup> and the farmers and manufacturers fell foul of each other over this and the Canadian Reciprocity Bill. This latter was carried against the opposition of the Insurgents—the grain-growers of the Middle West being their following. The regular body of the Republicans was commanded by Taft: the Progressives by Roosevelt. An extraordinarily exciting campaign, which might be called the 'New Freedom' election since both Progressives<sup>6</sup>

<sup>1</sup> Cf. Beard, *Contemporary American History*; Schlesinger, op. cit., p. 463 ff.; Stanwood, op. cit., II.; *Political Science Quarterly*, 1912, Vol. XXVII, pp. 362, 742-6, for an account of the campaign.

<sup>2</sup> Cf. F. Norris, *The Octopus*.

<sup>3</sup> Cf. *Our Chief Magistrate and his Powers*.

<sup>4</sup> The Payne-Aldrich Act of 1909 lessened the duties on raw materials employed in manufacture (to some extent). The wool duties were not reduced, other duties were raised—the general level being about 40 per cent. The pledge of downward revision was considered not to have been fulfilled. Cf. Bogart, op. cit., p. 704.

<sup>5</sup> Cf. Holcombe, op. cit., p. 263.

<sup>6</sup> The Progressives proclaimed their devotion to effective representative government, declaring themselves in favour of direct primaries for the nomination of state and national officers, of nation-wide preferential primaries for Presidential candidates, of the direct election of Senators by the people, and the adoption of the short ballot by the states. They advocated also easier amendment of the constitution, increased Federal control over national problems, equal suffrage, strict limitation of campaign contributions and expenditure and 'detailed publicity of both, before as well as after primaries and elections'. They demanded further publicity in parliamentary procedure and a large measure of judicial reform enabling the people 'to determine fundamental questions of social welfare and public policy'. Legislation was proposed on the following subjects: industrial conditions, agricultural credit, co-operation and schools, control of interstate corporations (strengthening Sherman act, etc.), currency (increased Federal control), downward revision of the tariff, conservation (and wise development) of natural resources, graduated inheritance tax, war widows and orphans' pensions (a 'wise and just' policy). Declaring themselves in favour of a stringent enforcement of the Civil Service Act they desired an extension of the competitive system. Finally they proposed legislation to protect the public from worthless investments. Cf. *Autobiography of La Follette*. For the Progressive Platform of 1912 see Stanwood, *History of the Presidency*, II (1897-1916), 288-98.

and Democrats <sup>1</sup> under Roosevelt and Wilson respectively fought to the tune of freedom and equality of the toiling millions, resulted in a Democratic victory, but by a minority of votes. The returns closely followed the economic interests appealed to.<sup>2</sup>

In 1920, the country returned to 'normalcy' with Harding as President—that is, it had realigned itself much as before the Republican split of 1912. This it could do because the Middle West was easy to arouse against the War and its aftermath—what was the League of Nations to the middle-western farmer? So also in the Congressional elections of 1918 and 1922. The Presidential and Congressional elections of 1924 <sup>3</sup> and 1928 <sup>4</sup> continued the Republicans in power and

<sup>1</sup> The Democratic Party denounced the high tariff and would admit tariffs for revenue purposes only. Legislation was proposed as follows: Stringent anti-trust measures, single Presidential term, supervision of railway, telegraph and telephone rates (the two latter in interstate commerce), facilitation of rural credits and elaborate agricultural scheme, prohibition of corporations contributing to campaign funds, judicial reform, re-organization of the civil service (extension of the merit system, etc.).

The party reaffirmed its hostility to the policy of Imperialism in the Philippines and elsewhere and also declared itself an enemy to the centralization of Banking: 'Banks exist for the accommodation of the public, and not for the control of business.'

The predominance of agricultural plans and of policies for the development of natural resources (especially rivers) distinguishes this platform from that of the Progressive Party (described above).

For further details see Stanwood, *op. cit.*, II, 260-71.

<sup>2</sup> Cf. Holcombe, *op. cit.*, p. 275. Wilson carried forty of the forty-eight states but obtained 41.8 of the popular vote.

<sup>3</sup> In the Presidential election of 1924 the results were: Coolidge (Rep.), 15,718,789; Davis (Dem.), 8,378,962; La Follette (Progr.), 4,822,319; Soc. Lab., less than 35,000; Workers' Party, less than 35,000; Nat. Prohibition Party, 48,000; Commonwealth Land Party, 3,000.

#### CONGRESS (1924)

<i>Senate.</i>		<i>House of Representatives.</i>	
Republicans . . . . .	50	Republicans . . . . .	232
Democrats . . . . .	40	Democrats . . . . .	183
La Follette Republicans . . . . .	5	La Follette Republicans . . . . .	5
Farmer-Labour . . . . .	1	Farmer-Labour . . . . .	3
		Socialists . . . . .	2
<hr/>		<hr/>	
Total . . . . .	96		425
	<hr/>		<hr/>

<sup>4</sup> In the Presidential election of 1928 the results were: Hoover (Rep.), 21,429,109; Smith (Dem.), 15,005,497; Thomas (Soc.), 267,835; Foster (Workers), 48,228; Reynolds (Soc. Lab.), 21,181.

#### CONGRESS (1928)

<i>Senate.</i>		<i>House of Representatives.</i>	
Republicans . . . . .	49	Republicans . . . . .	235
Democrats . . . . .	46	Democrats . . . . .	193
Farmer-Labour . . . . .	1	Farmer-Labour . . . . .	2
		Socialist . . . . .	1
		Vacancies . . . . .	4
<hr/>		<hr/>	
Total . . . . .	96	Total . . . . .	435
	<hr/>		<hr/>

(*American Year Book*, 1925 and 1929.)

revealed once more the continuity of the South and North and West alignment of American party forces, and also the Republican weakness from Progressive forces, like those led by La Follette in 1924, of the North-West.

Finally, the parties have frequently been closely balanced numerically in both Houses ; <sup>1</sup> and frequently each party has been in a state of fission in which sections of the one have co-operated with sections of the other against their own parties.<sup>2</sup>

**Survey.** This slight sketch of American political parties presents a far different appearance from that of the British scene. Where does the difference lie ? Mainly, I believe, in the fact that the British parties come into possession of the whole plenitude of sovereignty if they obtain a majority. They have the whole sphere of human interests from which to choose and combine their policies ; and hence they can develop a programme which includes pledges, both definite and sincere, convertible into legislation without the risk of a naked and violent battle between opposed interests as in the American Civil War, and without the need of inventing magniloquent but empty programmes. The American Constitution permits the Federal parties to do only those things which are bound to cause some section a keen sense of deprivation, because it permits economic measures only : a benefit to one section can only be paid for by the obvious burdens of the rest. There is a poverty in the problems of civilization, in part through constitutional limitations and the reserved powers of the states, in part through the material and spiritual factors we have already noticed in our general remarks on the American party system. In truth, the task of not dissolving into factions is sufficiently difficult for the parties which must organize a continent composed of a number of vast tracts with immense differences of soil and climate, resources, culture, religion, race, and development. Hence sectionalism, evasive and bombastic programmes, infrequent achievements, and either non-partisan or bi-partisan additions to the statute-book or Constitution.

### GERMAN PARTIES

In the Reichstag elections of September, 1930, a score of separate political parties competed.<sup>3</sup> We relegate to a footnote the least con-

<sup>1</sup> For example, in the House of Representatives in 1859, Republicans numbered 113, Democrats 101. In 1877, Republicans were 137, Democrats 156. In 1917 Republicans were 216, Democrats 210. Similarly in the Senate : In 1881, Republicans 37, Democrats 37 ; in 1911, Republicans 49, Democrats 42 ; again in 1927 both parties were numerically equal, having 47 members each. Cf. Hasbrouck, *Party Government in the House of Representatives*, 1927, App. A.

<sup>2</sup> Cf. Lowell, *The Influence of Party upon Legislation*, *Am. Hist. Ass. Rept.*, 1901 ; Hasbrouck, *op. cit.*, Chap. X ; Holcombe, *op. cit.*, Chap. XII.

<sup>3</sup> Cf. *Hauptergebnis der Reichstagswahlen 1930*, *Deutsches Statistisches Amt*.

siderable parties, and deal more particularly with the origin, nature and following of the larger parties.<sup>1</sup>

From the general picture of the German party system, however, these features stand out: (1) a great party founded upon a religious basis, the Centre Party; (2) a number of small parties founded upon a racial or national basis, e.g., Bavarian National Party, the German Hannoverian Party, and the National Minorities, like the Polish Party, the Lithuanian Party; (3) a number of parties for the furtherance of particular economic interests like the Party of the Middle Class, the Land Union, the Peasants' Party, the 'Party of those injured by Monetary Inflation', etc.; (4) a large Communist Party; and, finally (5) a party of which a very important ingredient is anti-Semitism—the National Socialists.

The parties of the Right, in order of their age, rather than recent electoral successes, are the German National Party, the German People's Party, the National Socialists, the Economic Party, and several smaller groups.<sup>2</sup> In the centre, although leaning towards Conservatism, are the Centre Party and its Bavarian self, the Bavarian People's Party; and on the Left the People's Right Party and the German State or Constitutional Party, all that remains of the historic Progressive and Democratic Parties. On the Left are the Social Democratic Party and the Communist Party.

The German parties of the Right reach back in their philosophical connexions to the anti-Revolutionary, Romantic philosophy of the State as developed by Gentz, Novalis, Schlegel, Adam Müller and, with differences, Hegel.<sup>3</sup> This trend of theory emphasizes the organic nature of the State, denies the rational social contract among 'atomized' human beings, and stresses the importance and natural origin of the various Estates (*Stände*). It glorifies nationality and patriotism, paternalistic State activity, and acceptance of traditional values. It is monarchist,<sup>4</sup> anti-democratic: and declares that royal authority, like all authority, comes from God.<sup>5</sup> Until the establishment of the Prussian Diet in 1847 no party was organized; there were casual

<sup>1</sup> For example, *Reichspartei des deutschen Mittelstandes (Wirtschaftspartei)*, i.e., the Party of the Middle Classes, or Economic Party, with 23 seats in the Reichstag of 1928; *Christlich-Nationale Bauern und Landvolkpartei*, i.e., the Christian National Peasants and Rural Party, with 9 seats in the Reichstag; *Volksrecht Partei*, i.e., the National Justice Party, or Party for Justice in Economic Enterprise, 2 seats; *Konservative Volkspartei*, i.e., Conservatives, a wing of 37 members who seceded from the National Party in 1929, they are less extreme than the Hugenberg Nationalists; *Christlich-Sozialer Volksdienst*, i.e., Christian-Social National Service, a party of conciliation.

<sup>2</sup> *Landvolk*, 18 seats; *Konservativen*, 5 seats; *Landbund*, 3 seats. (Reichstag 1930).

<sup>3</sup> For these Gooch's *Germany and the French Revolution* is a good English introduction; in German there is Baxa, *Die Politik im Spiegel der Romantik*.

<sup>4</sup> Cf. F. J. Stahl, *Rechts und Staatslehre auf der Grundlage Christlicher Anschauung* (1830-37).

<sup>5</sup> Cf. Karl Ludwig Haller, *Restauration der Staatswissenschaft* (1816-34).

concentrations of groups around periodicals.<sup>1</sup> Not, however, until the revolutionary storms of 1848 did the conservative tendencies crystallize: then the great landowners on their defence against a heavy land-tax project by the Liberal Prime Minister, Hansemann, the theorists, the high civil servants, and the dignitaries of the Evangelical Church created the *Kreuzzeitung* as the meeting-ground, while the conservative elements, peasantry and King were educated by 'Fatherland Unions', 'Unions of Prussians', and 'Societies for King and Fatherland'.<sup>2</sup> In the Prussian National Assembly of 1848 groups of the Right permitted only a constitution imposed from above (*oktroiert*). In May, 1849, the three-class system of election was imposed, and defended against liberal egalitarian attacks as a generous concession. It was, of course, the offspring of the theory of the natural inequality of man, of the right of the propertied to defend themselves, of the confusion of wealth with political ability and superiority of breed. Its practice and defence were maintained until the people rose in 1918. Broadly the Right was Prussian-particularist; particularist, also, were the groups of the Right in all the German States; but in Prussia the Extremists in this as in other matters now grouped around Gerlach, while Bismarck with followers gradually drew away towards a more liberal, because a more practical, system. Their natural affinities in foreign policy were, of course, the countries of Metternich and the Czar, their enemy the country of Napoleon, of revolution and universal franchise.<sup>3</sup> To counteract Bennigsen's great National Liberal organization the Prussian National Union was founded in 1861; but a cleft widened between it and the extreme Conservatives of East Prussia, for it was prepared to make some, if not generous, concessions to the liberal theory of constitutional monarchy, and, economically, was ready to pursue a paternalistic-democratic social policy towards small industry and credit institutions. The Eastern, agricultural Conservatives were adamant in this respect, and hostile to Bismarck's anti-Austrian policy.<sup>4</sup> Indeed, so strong was their economic and cultural bias that they broke with Bismarck and his federal policy, even rejecting the indemnity awarded him at the conclusion of the War. They were afraid to be united with countries whose liberal and revolutionary past threatened their traditional privileges.

The result was a formal split between non-Bismarckian Conservatives and Bismarckian Federalist Conservatives, afterwards called the Free Conservative Party or the 'New Conservative

<sup>1</sup> Cf. Bergsträsser, *Geschichte der deutschen politischen Parteien*.

<sup>2</sup> It is interesting to notice the title of their association: 'Association for the protection of the interests of Great Estate-owners and the promotion of the well-being of all classes of the population.'

<sup>3</sup> Cf. Ritter, *Die preussischen Konservativen und Bismarck's deutsche Politik* (1913).

<sup>4</sup> Cf. Herberger, *Die Stellung der preussischen Konservativen zur Sozialen Frage, 1848-62* (1911).

Fraction' in Prussia, and in the Reichstag, the German Empire Party.<sup>1</sup> The Old Conservatives deplored the *Kulturkampf*, not out of love for the Catholics or prejudice in favour of universal tolerance, but because they feared a weakening of the position of the Protestant Church of which they were the leaders in the State. They opposed Gneist's local government reforms, which would weaken the patrimonial status of large estate owners. In 1876 the old Conservatives reorganized as the German Conservative Party—they, too, for their very lives, accepted the Empire, and once attempting to rule against it, they now organized to rule through it. Conservatives of both wings became reconciled with Bismarck as soon as he no longer needed the National Liberal voter to support him, and proceeded to a national protective tariff scheme and the Anti-Socialist Laws at the end of the 'seventies. However, for years and years the total Conservative strength never reached more than two-ninths of the membership of the Reichstag or of the Diet in Prussia. They were readier to unite in Government Coalitions with the Catholic Centre than with the National Liberals or parties more on the Left. So Bismarckian projects (1880) for biennial budgets and the reduction of the legislative period from five to four years (which would give the Government a more frequent opportunity of managing the elections) were supported only by them. They aided the Centre Party in its acceptance of the Accident Insurance Law. They were favoured by the Tariff Law of 1885 which gave substantial protection to agricultural products; they were the friends of the Military Project of 1886, which would have increased the standing army and established a programme for seven years (and ultimately did). In Prussia they accepted the Income and Industrial Tax in 1891 because this decreased the power of the Reich over Prussia, and they defeated the School Bill. In 1892 the agitatory benefits of anti-Semitism were formally blessed in the party programme, and, as in Spain of the Inquisition, racial and religious feeling was only a partially sincere addition to economic jealousy.

The Jews were in some places, for example in Hesse, able to take advantage of backward civilization; and the proximity to Russia, Poland and Austria, within whose borders the Jews shared their hosts' benighted ignorance, bigotry and personal uncleanness, always provided an anti-immigration cry.<sup>2</sup> In 1893 the Conservative groups were joined by a strong companion in the Union of Farmers (*Bund der Landwirte*) who organized to protect agricultural interests in the legislature, with the principles of protection, defence against undue taxation, the establishment of Chambers of Agriculture and super-

<sup>1</sup> *Freikonservative* and *Deutsche Reichspartei* respectively.

<sup>2</sup> Cf. Wawrzinek, *Die Entstehung der deutschen anti-Semiten parteien*, 1873–90 (1927).



vision of the Stock Exchange. They were opponents of the great East to West Canal project since this was advantageous to the industrial West, which would attract labour away from the great estates. The party was not very numerous in the Reich, but it had both influence at Court and a balancing position with the Centre and the National Liberals, while in Prussia the three-class system and control of local government gave it a permanently artificial but effective strength. There redounded to the advantage of the Conservative Party, as of the National Liberals, the funds and propaganda of the *Bund der Landwirte*, the *Central Association of German Industrials* and the *Flottenverein* (Navy League) established 1898.

Since the Conservatives needed the Centre and the Centre needed the Conservatives each for their own advantage, the spectacle, to many citizens disgusting, was witnessed, of a party of Protestants and a party of Catholics in collusion for temporal things, while other Protestants felt it oppressive to be ruled by a Catholic minority. It was for years a remarkable brotherhood, which supported the Colonial and fleet policy and wildly fought liberalization of the Prussian franchise and income tax and death duties in Prussia. (The latter caused a break with the Centre and the collapse of Bülow's Chancellorship which had proceeded on a coalition of Conservatives, Centre and Liberals.) From 1914 they were the steady friends of war *à outrance*. In the National Assembly at Weimar their political theories were expressed in their fullest form : to those we shall allude later. The aftermath of the War caused a general reorganization of all parties and among them the Conservatives : the German Conservatives and moderate Conservatives formed the *German National Party* (the *Deutsche Nationale Volkspartei*). It also largely absorbed the Christian Social Party (*Christlich-Soziale Partei*), founded in 1878 by the Court Preacher Stöcker, as a Christian, monarchist and patriotic organization of workers and counterblast to the atheist, republican, and international Social Democrats. It was a kind of Tory Democratic movement, soon taken under the friendly wing of the Conservative parties. In 1896 it lost its Liberal followers who formed the *National Socialist Union* led by Pastor Friedrich Naumann. There are only remote spiritual connexions between this and the party now led by Hitler under the same name. The Anti-Semitic Party was also an offspring of the mind of the good Christian Court Preacher Stöcker who led an agitation with the help of the teachers Förster and Henrici and Lieutenant von Soumeberg. This alliance of Church, School and Army produced anti-Semitic petitions to the Reich Chancellor, and by 1890 five members had been returned to the Reichstag ; by 1893 they had sixteen members. The groups which this party included issued a common programme in 1895 : in 1906 they split asunder each with

separate programmes. These parties had always been followed by members of the lower and middle middle-class.

A little to the left of this party there was established another Conservative party, the *German People's Party*, formed out of the conservative remains of the National Liberal Party. Both these parties were monarchist, but the former was much extremier in nationalism and anti-Liberalism. In the elections to the Constituent Assembly of 1919, the *German National Party* called itself the party of the middle-class and appealed to handicraftsmen, business-men, officials and the salaried groups. In fact in the Constituent Assembly its membership consisted of about 30 per cent. agriculturists; industrials and merchants 12 per cent.; evangelical clergy about 10 per cent.; teachers and civil servants about 20 per cent.; trade union officials 10 per cent.; journalists, doctors and handicraftsmen made up the rest.

Its state of mind is apparent from (a) its programmes and electoral declarations and (b) its attitude to various of the principal issues which have arisen since the Revolution. It deplores the destruction of the Empire built by Bismarck, but is prepared to adapt itself to an ordered state based on majority rule and led by a 'strong, decided Government'. The bases of its policy are patriotically German, and the 'living forces of Christianity'. They demand the maintenance and protection of their frontiers, the care of German minorities abroad, and union with German Austria, protection of personal and political freedom and private property and 'equal rights for all'.<sup>1</sup> This sounds like the programme of a minority! They desire Imperial unity, but with federal qualities; the strictest public economy. In their early declarations the monarchical element is pronounced.<sup>2</sup> The army is still their favourite child, and they are the strongest opponents of unilateral disarmament. Bolshevism is their *bête noire*. '*We fight for all! For yourselves, and the happiness of your children and grandchildren! The subject is holy! The existence and the whole future of our beloved Fatherland!*'

Although in former years the party would have been horrified at woman suffrage, they now 'greet German women as entitled to fully

<sup>1</sup> 'Private property, private enterprise, initiative and the spirit of enterprise must be the fundamental principles of our economic life, which we defend against all open or hidden communism. Where, in the social interest, the transfer of private industry to civic control is necessary, we demand its expert execution by experts.'

<sup>2</sup> 'We are convinced that even in the new democratic Constitution of Germany a monarchical head is required, a continuous personal factor of permanence in political life and the historically developed characteristics of our nation, as well as by political expediency' (Dec., 1918, Salomon, *Die Parteiprogramme*, p. 25). 'The monarchical form of the State corresponds to the nature and historical evolution of Germany. Standing above parties, the monarchy best guarantees the unity of the people, the protection of minorities, the continuity of the affairs of State, the incorruptibility of public administration. The German States shall have free discretion regarding their form of the State; for the Reich we attempt to revive the German Kaiserdom as established by the Hohenzollerns' (1920, Salomon, p. 109).

equal rights in public life'. Having previously enjoyed exceptional privileges in local government and public offices, they now insist that 'offices in the states and localities are to be recruited only according to fitness'. They wish a strong and plentiful population to be produced by rural development, peasant proprietorship, and for large estates, and housing. Christianity shall be taught in the Schools—but this cannot be done without reciprocal advantages to all sects—hence universal guarantees for all churches. The home is to be protected by repression of alcohol consumption and by the censorship of all that is shameful in social life. Schools are to teach in a national and Christian sense, especially through the medium of history. An educational ladder is to be made economically possible, and emphasis is laid upon common schools for all in which a uniform spirit of patriotism may be developed. The party frowns on class dictatorship; it cries out for academic freedom. It recites its hatred against the Jews.<sup>1</sup>

In the lack of political education of the Germans it sees the reason for the downfall of the Empire, for that could be maintained against external foes only by internal unity, and the people were insufficiently capable of pursuing or meeting this necessity. A sense of duty and devoted co-operation alone maintain a strong state.

'With strong belief in our future, but also with a sober sense of reality and a strong feeling of responsibility we will build for it. The strength we will obtain from our history. Its traditions will become ever more vivid. Its forms will charm our youth. It gives us our ideals which the ideal-less states of to-day cannot dispense with.'<sup>2</sup>

We need 'inner reconciliation' and 'enlightened social feeling'; 'a keen, creative set of *entrepreneurs* and a highly developed, hearty working class' both co-operating happily and bound together by love of the Fatherland. Our trouble is our lack of a long and securely developed national feeling! Germany must be freed of external obligations and servitude, must find her independent place among nations. We desire the unity of the Empire, but that is to be obtained by not too tight a centralization—the independence of the States is to be protected; and Prussia, especially, must not be broken up! 'We represent the organic idea of the State. For us the State is a living national body in which all limbs and forces must arrive at co-operation.' Hence by the side of the representative assembly based on universal suffrage, which shall have 'decisive (?) co-operation in legislation and real (?) supervision over policy and administration, there ought to be a representative body which rests upon a foundation of economic and spiritual

<sup>1</sup> 'The German National Party fights every disruptive, un-German spirit, whether it emanates from the Jews or other circles. It acts against the predominance of the Jews in government and public affairs which has become more and more noticeable since the Revolution. It requires that the immigration of foreigners over our frontiers shall be stopped' (April, 1920).—Salomon, III, 50 ff.

<sup>2</sup> *Ibid.*, p. 107.

functions'. The party sets out to win the officials by the promise of everything except rights of association and the strike. The mothers and the children are promised many improvements in health administration. The Universities and the student bodies are tickled by the recitations of the need for academic freedom and self-government, and the youth of the country are appealed to through their interest in sport which is to be used for 'moral development and German and civic attitude of mind'.

In the Constitutional Assembly this party fiercely defended all the old social and economic elements of the State—monarchy, a united Prussia, the old flag, guarantees for the bureaucracy, increase of Reich powers; it wanted at once religious freedom and religion in the schools; a long period for the Reichstag, a strong Reichsrat, no truck with Socialism, or such anti-social devices as kindness to illegitimate children.

The German People's Party, *Die Deutsche Volkspartei*, came into being in November, 1918, after an attempt to unite the National Liberal Party with the Progressive People's Party on a liberal, democratic basis. The Progressives could not accept Stresemann and others, who had supported a war of annexation and an unrestricted submarine campaign: the right wing of the National Liberal Party soon after formed the German People's Party. It is proper at this point to look back briefly at the traditions which the National Liberals created and to which the new party is heir. It originated in the democratic and the unitary streams of tendency.<sup>1</sup> Two groups emerged—one desired liberty but preferred unity thereto, and another desired unity but not at the cost of liberty. The former group's adherents in Prussia were prepared to adapt themselves to the imposed constitution and the three-class system of voting. The group of the Left, the Democrats, however, refused to participate in the elections and were satisfied with popular agitation. Its uncompromising hatred of the monarchical system and demand for full popular sovereignty are expressed in a catechism by Harkort which is conveniently available.<sup>2</sup>

Towards 1860, however, a common campaign was conducted against the Conservative reaction which had been especially stimulated by the plight of Russia in the Crimean War. On the other hand, both Liberals and Democrats aspired, though with differences, to the free constitutions of the Western countries engaged in that struggle. Yet the parliamentary representatives broke into two fractions, a conservative-liberal one which followed the government, and a second, strongly democratic. These two groups arrived at a common under-

<sup>1</sup> The tendencies were subtly and variously fused in the Frankfurt Parliament of 1848. Cf. Brandenburg, *Die Reichsgründung*, I.

<sup>2</sup> Salomon, op. cit., I, 68 ff.

standing on a policy of German federation in 1859 and founded the National Union (*Nationalverein*) under the leadership of Rudolf Von Beningsen. The 'little-German' solution of a federation headed by Prussia and with hereditary monarchy was accepted.<sup>1</sup> A policy of Liberal co-operation with the monarch, shattered against the steady resistance of the Conservatives in their fastnesses of the civil service, their social position and local privileges. The members of the Left Wing became impatient and broke away to form, in 1861, the German Progressive Party (*Deutsche Fortschrittspartei*). To the right of them stood two moderate Liberal groups, at first co-operating in the Constitutional conflict. The Progressives alone remained completely obstructionist in face of Bismarck's attitude, and his management of elections. The Diet was dissolved; the War in Schleswig and against Austria was undertaken and won; there was a re-groupment of parties—the electorate was gratified by military success and the great step towards solution of the problem of German unity, and new economic vistas opened up before the industrials who had hitherto been anti-governmental, because anti-conservative. The act of indemnity for Bismarck's actions during the suspension of the Diet crystallized the new tendencies: the unity groups, of moderate constitutionalism, went over to Bismarck under the name of the National Liberals, led by Beningsen of the National Union. Henceforward there were three well-known regularly organized German and Prussian parties: the Moderate Liberals, with conservative bias, the National Liberals, and the German Progressive Party.

From 1866 to the War, the National Liberals pursued a policy which distorted the meaning of Liberal in its title: at once 'the defence with devotion and emphasis of the freedom of the German people', and 'the *supreme necessity* of national duty that everything shall occur on the part of Parliament itself to extend the North German Confederation into a Reich of the whole German nation'.<sup>2</sup> The party received concessions for its unitary policy and support of Bismarck, on conditions, the Reichstag's control of the administration and the budget, free trade in commercial policy (until 1878 when Bismarck turned protectionist), local government and administrative law-reforms. The party gave way regarding a loan for a Federal Navy (1869), the penalization of seditious utterances in the Press (1872), increases of military appropriation for a long term of years, beginning with the 'Septennate' of 1874; the persecution of the Catholic

<sup>1</sup> Salomon, I, 92-3: 'Under the present conditions the most effective steps to the attainment of this end can only be taken by Prussia . . . if Germany should soon be again threatened directly by foreign countries. Then, until the definitive constitution of the German central government, the direction of German military forces and diplomatic representation of Germany must be vested in Prussia,' etc. Cf. also Onken, *Bennigsen*, I, 336.

<sup>2</sup> Cf. *Wahlaufruf*, 1866; Salomon, op. cit., I, 130, 131.

Church in the *Kulturkampf*, the persecution of the Socialists. By 1880 the party was weakened by internal dissension in which free trade struggled with protection and democratic tolerance with oppressive ostracism: the party lost members in the country and a group of South German protectionists in the Reichstag. Discussions on the Military Appropriations Law of 1880, providing for the next seven years, caused the secession of another group—including Lasker and Bamberger among others. Beningsen, on the other hand, with his remnant, sought always for a *rapprochement* with Bismarck in order to outmanœuvre the Conservative and Centre Parties. The National Liberals supported the Accident Insurance Law, the Left groups voted against it. The Left groups moved more towards the Progressives and in 1884 coalesced therewith, forming the German Independent Party (*Deutsche Freisinnige Partei*). The National Liberals went further to the Right under Miquel, Oberbürgermeister of Frankfurt, until the Liberal element practically disappeared. They obtained the funds, from the great industrials, for the new Imperialism.

‘To meet such a majority is more than ever the duty of all friends of the Fatherland. Not in the interests of a party, but for the Fatherland we call on our friends to do their duty. . . . Be led by great patriotic principles, not by small differences of opinion and conflicts of interest.’<sup>1</sup>

It now made occasional electoral agreements with the Conservatives and the Centre, especially regarding candidates for the second ballot, and co-operated with them against the Left. It accepted even the extension of the term of the Reichstag to five years; and in the period from 1890 to the War, generally followed the military, fleet, colonial and paternal industrial policy of its colleagues. Towards 1914 there was a certain leaning Leftwards to the Independent Liberals and the Social Democrats (it even lisped of the rights of the working classes and trade unions), but as a protest against Manchesterism, not as an approach to Socialism; but there was no change of heart—rather a bitter disappointment with the fellowship of the Centre of the too-agrarian Conservatives.

National Liberal foreign policy was a direct demand for ships, guns, and a strong foreign policy. Under Stresemann the party stood for the most extreme persecution of the War (years before it had inveighed against the internationalism of Marxian Socialism), and weakened only in March, 1917, when it was seen that the ruling classes had no intention of any democratic reform of the Prussian electoral system, and that, in fact, the military authorities were likely to make a *coup d'état*. It united with the parties of the Left against the government in forcing an inquiry into constitutional reforms, and thenceforward acted in occasional co-operation with

<sup>1</sup> Cf. Salomon, II, 22 ff., Declarations of 1884, 1888, and 1890.

them.<sup>1</sup> But the attitude of Stresemann is indicative of the attitude of the party—he was called *Ludendorff's Young Man*. The party was, and is, intensely nationalistic. Moreover, the creation of an independent Poland was strongly opposed by the party. This party, with these traditions, became, after the loss of its more liberal elements, the *German People's Party*. What are the essentials of its policy?

It is difficult to see the difference between this party and the German Nationals.<sup>2</sup> In fact, these parties have worked together in Prussian politics since 1919. Nor is it possible to find any marked difference of utterance as expressed in the debates in the German Constituent Assembly. However, events since 1919 have shown a preparedness on the part of the German People's Party to enter into coalition with the parties of the Centre and Left. It has been less intransigent than the party on its Right. Moreover, on its Left wing, and represented by such a figure as Professor Wilhelm Kahl, are those who correspond to quite a liberal type. They have, at any rate, accepted the Republican basis of the Constitution, denied the propriety of adamant conservatism, accepted the Weimar colours, and sought the way to a peaceful, if sacrificial, re-entry into the comity of Western nations. They are less insistent upon the rights of large agricultural estate owners than the Nationals.<sup>3</sup> In England they would form the moderate wing of the Conservative Party. It is difficult to see what, except history, an organization, and the ministerial ambitions of the leaders, keeps it from its affinities. The extraordinary condition of German politics is, however, revealed in this, that Stresemann, the leader of the German People's Party, was foreign minister in several coalitions, but did not *ipso facto* carry his party with him: he was, as it were, detached from his party for the good of the country.

**The Centre Party** (*Die Zentrumsparlei* or *Zentrum*). The Centre Party declares that it is not an exclusively Roman Catholic party and that it does not wish to be. Yet it was established for Roman Catholic purposes, and, in 1924, 56 per cent. of all Roman Catholics in Germany voted for it, the other 44 per cent. were divided among all the other parties, while, it is said, if practising Catholics alone are considered, something like 80 per cent. are found to follow the Centre Party.<sup>4</sup> It is, indeed, remarkable! this obvious constituency of the Party and its constant attempts to claim a wider inclusiveness. The Centre Party, in fact, still has its roots in religion and faith in the Church; on a religious basis it unites all classes and interests and localities—it is a singular

<sup>1</sup> Rosenberg, *Entstehung der deutschen Republik*.

<sup>2</sup> Cf. Programme, 1920. Salomon, op. cit., p. 55 ff.

<sup>3</sup> Whereas the German Nationals had agriculturists 31 in the Reichstag of 1924, the German People's Party had 4. Cf. Kamm, op. cit., p. 14.

<sup>4</sup> Cf. Schauff, *Die Deutschen Katholiken und die Zentrumsparlei* (1928), a brilliant statistical analysis of election results.

diversity. How did this party arise ; to what policies was it able to lead its Catholic believers—they who claim the true Christian faith ; and how far is this party likely to remain both Catholic and unbroken ?

The party began in 1852 as a defence against an attack upon Catholic missions and university education by the Prussian Government, then in the full tide of Conservative reaction. The Rhineland provinces, the centre of Catholic population in Prussia,<sup>1</sup> returned Catholic members to the Landtag on the recommendation of the brothers Reichensperger. They challenged the evangelical bias of the Conservatives as well as their hostility to clerical movements for freedom. Usually co-operating with the Liberals in defence of the Constitution, they took a somewhat more conservative line in positive politics, since they could not accept the rather materialistic individualism of their partners. In the matter of German federalism they were for the 'Great-German' solution, since Bavaria, overwhelmingly Catholic, sought the inclusion of Austria, almost exclusively Catholic. They were certainly strong opponents of a Prussian Federation. The War of 1866 shattered the ideal of a Great-German federation, and removed from the field potential Catholic allies. More than ever the Catholics felt the need of a defensive organization. In the South the Bavarian Catholics were the centre of resistance to Prussian hegemony. In 1864 the syllabus of Pio Nono denounced Liberalism as the foe of the Church.<sup>2</sup> Little grace was to be expected from either Conservatives or Liberals ; none was desired from those further to the Left. In 1869 workers stormed the Moabite monastery near Berlin ; about the same time the councils and the declaration of Papal infallibility recalled Catholics to a loyalty beyond their native mountains.<sup>3</sup>

A policy was established in several programmes and electoral addresses, and the Catholic population of Prussia (this was appealed to until the Federation of 1871 was established) was urged to organize to defend itself as a minority in a hostile environment.<sup>4</sup> Claims were made for the independence of religious associations, for religious education in the schools, against civil marriage, a non-centralized federation, decentralization and local self-government, reduction of military expenditure. Later the leaders proceeded to non-religious

<sup>1</sup> The present (Census, 1925) distribution of the Catholic population (cf. Schauff, op. cit.): in Upper Silesia, 88.5 per cent. ; Westphalia, 49.8 per cent. ; Rhineland, 66.8 per cent. ; Hohenzollern, 94.4 per cent. ; Bavaria, 70 per cent. ; Baden, 58.4 per cent. The aggregate of these districts is over 15 millions, which is 75 per cent. of the total Catholic population of Germany. Germany's population consists of about 62.5 million people: about 64 per cent. are of Evangelical faith, and about 32.5 per cent. Catholic.

<sup>2</sup> Cf. Bachem, *Geschichte der Zentrumspartei*, Vol. I.

<sup>3</sup> Ibid.

<sup>4</sup> Reichensperger in the *Kölnische Volkszeitung*, 11 June 1870, cited Salomon, II, 159 ff.



affairs : reconsideration of the interests of capital and land-owners, and of these with labour, through the maintenance of a strong middle-class and an independent peasantry and small commercial and industrial class. A policy of social amelioration in those matters which threatened the moral or physical ruin of the workers was announced. So, for the Prussian Landtag and the Parliament of the North German Confederation ; so, also, for the elections to the first Reichstag. The party gradually proceeds towards a *general* demand for freedom and self-government for *all classes* of the nation, from its narrower basis, under the caption—*Justitia fundamentum regnorum*. Moreover it acquires a consciousness of power and its material basis too : for in Silesia and the South are millions of Catholics. In 1871 it had fifty-eight seats in the Reichstag, in 1874, 100 : out of less than 400.

The first two important demands of the party were German intervention in Italy to secure Papal property and the inclusion of a declaration of rights in the Imperial Constitution. This did not suit Bismarck. Nor did the policy of Windthorst, the uniting of Northern and Southern Particularists. Nor did the party's co-operation with the Guelfs (the Hanoverian protesters against annexation) and the Polish Fraction, and the Bavarian Patriotic Party, serve to mollify Bismarck. The *Kulturkampf* broke out : that is, Bismarck's onslaught upon the Catholic Church, and the Centre Party's defence by permanent opposition to the Government. The sterner the opposition, the more Bismarck violated the principles of the Faith and attacked the most vital pillars of its organization. Almost all, even moderate Catholics, were alienated. This strengthened the party. The National Liberals faithfully supported Bismarck : and could do so with a clear conscience since they were unitarist and resented Ultramontane intervention like that of Pius IX's Bull, *Quod Nunquam*.<sup>1</sup> In 1878 the Centre traded Protection and relaxation of Particularism, which Bismarck wanted, for the withdrawal of the anti-Catholic measures. The Centre became a Bismarckian Party, displacing the National Liberals. The law which secured to the Parliament control over the Budget, but also permanently established State contribution as a large source of federal revenue, was made by the Catholic, Franckenstein. The party were strong supporters of Bismarck's Social Legislation, but opponents of the laws against the Socialists. They voted against the Septennate in 1887 although Bismarck had persuaded the Pope to persuade Windthorst and Franckenstein to vote for the military supplies. Again in 1889 and 1895 they voted against the increase of naval and military appropriations. Bismarck had hoped that the Conservative wing of the Catholic party would outweigh the Liberal wing : it did, but not in his time. In the time of Caprivi and Hohenlohe the Conservative

<sup>1</sup> Cf. Bachem, *op. cit.*

and anti-Semitic elements of the party assumed the ascendancy ; it began to taste the fruits of office. In 1895 it obtained the presidency of the Reichstag ; it supported the Colonial policy ; in 1898, 1900, and 1906 it voted in favour of an increased navy ; in 1905 and 1911 the increases in the army. In return it received peace for the Catholic Church. It compelled, by its voting power, the complete demolition of the exceptional laws against Catholics. It found itself domesticated with the Conservatives and the National Liberals in the high protectionist camp, but as a concession to its liberal traditions it required certain surpluses from the duties on corn, flour and meat to flow into the Workers' Insurance Fund. In Prussia, in 1904, the elementary schools were placed on a religious basis and the Roman Catholics acquired their place upon the school-management committees. The Centre was, however, torn between its right and left wing, and the numerous interests which Catholicism included. This was exhibited in its attitude towards the Colonies—it desired a Colonial policy, but insisted with extraordinary vigour upon safeguards for decent administration ; then, in 1906, not having received the guarantees it wished regarding the reduction of the troops in the African Colonies, it turned against the Government. Bülow smote them at the well-managed elections, and governed with the Conservatives, National Liberals and Progressives. Deprived of its latent coercive power—which it had enjoyed since 1894—that of making a majority hostile to the Government by co-operation with the Social Democrats—the Centre quickly returned to its loyalty to the flesh-pots : it did not deny the Government any further, even in the War, until 1917, with one interesting exception, its coalition with the Conservatives to reject the death-duties proposed by Bülow in 1909.

Thus, the Centre revenged 1906, and were at the same time true to their special constituents. They even rejected, in the Prussian Diet in 1909, a moderate measure amending the three-class franchise. They supported, however, the amendment of Labour Legislation and the establishment of the Insurance Laws of 1911–13. The liberal element in the party did not come to the top until a new leader, Erzberger, in 1917, realizing at once the inevitability of defeat and the meaning of Catholic Christianity, startled the Reichstag with peace-talk, and led the Centre into coalition with the parties of the Left. The rise of Ludendorff's despotism during 1916 incited the parties of the Left to demand constitutional guarantees, like ministerial responsibility to the Reichstag. The Centre Party moved with them—leaving the Conservatives isolated. Then Erzberger, convinced that the War had been lost, took steps in the direction of peace—the party definitely went Left. He had accurately measured the feeling of the Catholic workers and peasants—and his action brought together into one anti-governmental block, the workers, the small

peasantry, and the middle class of the whole country against the Prussian nobility and heavy industries. This produced the Reichstag Peace Resolution. In the government of Prince Max of Baden, the Centre members, Trimborn and Gröber and Erzberger, were colleagues with Social Democrats.

It was said of the Centre Party before the War that its attitude could hardly be calculated except that it would oppose the Social Democrats. Yet after the War, even in this matter it changed its attitude. With the Social Democratic Party and the Democrats, it made the Weimar Constitution. It certainly would have made a less democratic and socialistic constitution had it had an independent majority;<sup>1</sup> and, in fact, some of its members voted against the Constitution. However, it is a Weimar Constitution Party; and it has rallied to the defence of the Constitution on the occasions of its attack from Right and Extreme Left. It could not do otherwise where it has regard to its West Prussian constituencies, and the Christian Trade Unions.

The main lines of its policy as shown in its programmes are as follow. It insists on the principle of Liberal democracy, and upon strengthening the Imperial tie while leaving the States sufficient independence, *especially in the realm of School and Church*. It especially emphasizes the importance of a declaration of rights in order to secure to all citizens 'without distinction of political and religious creed the unhindered expression of their convictions', in speech, writing, meetings, associations and fellowships of all kinds. It stresses the need for world peace, and reparation, and international law based on Christian principles; these shall safeguard the independence of the Holy See. A League of Nations and obligatory arbitration, disarmament and open diplomacy, internationally secured freedom of the seas, and regulation of industrial conditions are demanded. A reformed foreign and colonial service is required. In the Colonies slavery of all kinds should be abolished, and Christianity promoted. There is a long series of claims regarding religious culture in the home, the family, Church and School; all in a generous and Christian temper. (Here is the distinction from Socialists and Communists.) In economic and social policy, social justice and the general welfare are established as the primary standards. The party asks for the fundamental acceptance of private enterprise based on private property. (Here is the distinction from the Socialists and Communists.) *But subordinate to the principle of Social Welfare.*

<sup>1</sup> In its manifesto of 30 December 1918, it accepts the Revolution, but puts democracy into the foreground before socialism; and challenges the arbitrary rule of bureaucracy, class and party despotism. Cf. further its apology (in the manifesto of May, 1920): 'If a coalition, then, were essential to the salvation of Germany, we were also moved to co-operation by regard to our cultural interests. Coalition means concession, agreement on a middle line. None of the co-operating parties could therefore carry through its party programme.'

(Here is the distinction from the Nationals and the *Volkspartei*.) Its policy regarding agricultural land looks to the common weal and rural resuscitation through housing, small holdings and peasant proprietorship. (Here it differs especially from the parties of the Right.) It seeks to reconcile the conflicting claims of the various branches of industry. (Here it differs especially from the parties of heavy industry and cartellization—the Nationals and *Volkspartei*, and offers protection to the middle classes, handicrafts-groups and commercial classes. The *Volkspartei*, the *Wirtschaftspartei* especially proclaimed such intentions also : hardly the Socialists and Communists—they are not supporters of the entrepreneurs and the small men.)

But where is the soul of this party ? It resides in its Catholic Christianity. Its deeds before the War cannot be said to have found their animation in such a spirit, whatever apologists have said. For colonial enterprise it may have pleaded the benefits of Christianity to the savage tribes ; for armaments it may have pleaded necessary defence against encirclement by Protestant and Orthodox nations. Such pleas can hardly stand a second's examination from the standpoint of a Catholic gospel. The party bartered its soul for its existence although some of its members deplored the traffick. To what spirit does it now burn incense ? It worships the idea of a Christian community. But its Christianity is not that of the German National Party or the National Socialist Party : for that is more materialist, acquisitive and separatist. Catholic Christianity insists more upon human equality and asceticism, and deplores individual separatism and graspingness ; its charity is more generous. It is not sure that legal means are the only or the best remedies for earthly problems ; spiritual renewal is indispensable. This is the means to the conquest of the caste spirit and the class-war. Hence the emphasis upon religious education in the schools ; and the repeated insistence upon the rule, ' love thy neighbour as thyself ! ' It believes that the Treaty of Versailles denies the Christian fraternity of nations, hence the trend of its foreign policy towards revision. It is democratic because it believes in the equality of men. It will not countenance a completely disarmed State—there must be an army equal to Germany's internal and external dangers—no Christian reason is given for this, however. It supports the creation of a functional representative body, for there it may promote the reconciliation of classes and industries : it even claims an organic connexion between industry and politics. With its eye on the South, it calls for protection for agriculture ; while, turning to the North and West, it has also an encouraging word for industry. Unlike the parties of the Right it believes in the co-operation of the workers in the management of industry. It is clear, especially from a further study of

details, that the party can only partially vindicate itself and get votes as a party of Catholic Christianity—it is obliged to be *German*<sup>1</sup> in its foreign and military policy, in its peculiar appeal to the various classes and interests and its difficult spread over agricultural and industrial territories.<sup>2</sup> The suspicion remains, also, that it is democratic (or rather parliamentary only), in spite of itself—because so many millions of voters have been taught that this system of government, or rather theocracy, is the only one which guarantees to them the social progress promised by the Centre.

The Centre Party's power reposes primarily upon the spiritual and temporal strength of the Catholic Church. The power of the confessional, the appeal of Catholic Clergy and co-religionists, are very strong : and who can resist the bondage of the ancestral and religious ties, those which give diurnal significance to this world, and promises of consolation and reward in the next ? Yet the Centre Party was not content to rely for its strength upon this alone, and as we have already said, sought from time to time to make an exit from its confessional tower,<sup>3</sup> and in its programmes the party beckons to non-Catholics. Moreover, it has attracted non-Catholics.<sup>4</sup> It saw that it must appeal to secular reason and interests, and it therefore established the *Volksverein*, the People's Association, as a cultural, research and propagandist body, and the Christian Trade Unions. The Christian Trade Unions were established in 1895 as a counter-weight to the 'free' trade unions, that is, the trade unions with Socialist bias and affiliations with the Social Democratic Party. They were said to be 'inter-confessional and politically impartial'. They seek the good of the workers by non-aggressive means. At the beginning of the year 1929 there were in Germany 5·8 million organized workers, and 1·5 million salaried employees. Of that number the Christian Trade Unions have 764,000 and 500,000 respectively, i.e. about 13 per cent. and 33 per cent. respectively ; while the 'free' trade unions comprised about 80 per cent. and 28 per cent.

<sup>1</sup> Cf. the parallel development in France of the *Gallican* Church. See Faguet, *L'État et L'Église in Problèmes Politiques*.

<sup>2</sup> Cf. the difficult transition from general Christianity to its German habitat in this paragraph (ex *Richtlinien der deutschen Zentrumspartei*, Berlin, 1922) : 'The Centre Party is the Christian people's party, which consciously accepts the German national community (*Volksgemeinschaft*) and is resolutely determined to realize the principles of Christianity in State, society, industry and culture. It sees in a conscious Christian-National policy the certain guarantee for the renewal and future of the German people. The unity of German races towards foreign countries and the united development of strength at home are the foundations of Germany's world-status. The political will of the whole nation must be applied to these national necessities which are, unconditionally, to transcend party politics. The demand for self-development and self-determination must, in this background, be controlled not by an egoistic will to power but by the *ethical idea of law*. The true Christian community of nations is, for the Centre Party, the highest *ideal of world policy*.'

<sup>3</sup> So the phrase used by one of the leaders of emancipation, Martin Spahn, in a famous article : '*Heraus vom Turm*.'

<sup>4</sup> Cf. Schauff, op. cit.

The Centre Party's representation in the Reichstag was smallest in the year 1871 when it began to organize : then it had 16 per cent. of the Reichstag; from 1874-81 it acquired 22 per cent. of the seats ; thenceforward until 1907 it held 25 per cent. and, for a period, a little over 25 per cent. of all seats, but in 1912 it sank back to about 20 per cent. ; it must have lost heavily (as did other parties) to the Social Democratic Party whose representation leapt from a little over 20 per cent. of the Reichstag seats in 1903 and 10 per cent. in 1907 to over 27 per cent. in 1912. Although its votes fell steadily and rather rapidly from 1873 to 1907 its seats increased : in 1907, at the height of its power, it had 25 per cent. seats but only 18 per cent. of total votes. Since the War its position has been affected by both the redistribution of seats (which till then favoured the rural constituencies as against the great towns where Social Democracy and Liberals had their strength), by Proportional Representation, and the split-off of the Bavarian People's Party. If we add together the votes of the party proper and its Bavarian counterpart, the Centre has degressed gradually from about 25 per cent. in 1907 to about 18 per cent. of the seats in the National Assembly of 1919 and to 14 per cent. in 1930. *The absolute number of votes has remained much the same* though it has fallen from the high level of 1919 ; but whereas in 1907 it had 18 per cent. of the votes, in 1928 it had only 14 per cent., and this indicates that the followers of the party have remained loyal to it and that the mortality of its voters has been at least in part repaired by young voters. But the masses of new voters have not gone into the Centre Party, but elsewhere, to the Conservatives, the National Socialists and the Communists.

However, the Centre Party has been eminently ministrable, and has participated in the formation of *every* Government since 1919, occupying a middle position with a slight bias towards the Conservative side—indeed, between 1920 and 1927, seven Reich Cabinets have had as Prime Ministers Centre Party leaders: Fehrenbach (once), Wirth (twice) and Marx (four times). In the Presidential election of 1925 the parties of the Left, including the Centre, combined to support Marx for the Presidency. In the crisis since 1929 Brüning has been hailed as a saviour. The party's parliamentary composition has distinguished it from other parties by the small proportion of large estate-owners and the large proportion—13·6 per cent.—of small landowners by vocation, the small number of industrialists and business men (6·8 per cent.), the large number of party and trade union officials (about 30 per cent.), the large numbers of officials and teachers (about 40 per cent.).

**The National Socialist German Workers' Party.**<sup>1</sup> In the elections of 1930, 107 seats of a total of 576 were won by this party,

<sup>1</sup> *Die National-sozialistische Deutsche Arbeiterpartei.*

and it became the second in the State, following the Social Democratic Party, which won 143 seats. In 1928 it had only twelve seats. It did not appear in Reich politics until 1924, when in the May elections it won thirty-two, and in the December elections it won fourteen, seats. The success is rapid. Upon what is it based? The votes must have been purchased by services or the promise of services. The basis of an ideal combination of promises to attract votes in Germany to-day, and until these promises are shown in practice to be empty, is this: a picture, which needs little exaggeration, of Germany's domestic and foreign difficulties, with an imputation of blame to certain definite causes, and the raging savage promise to eradicate those causes. Collect these elements, throw in the spice of popular bigotry, especially racial prejudice against the Jews, and millions of the miserable and oppressed will follow! The opportunities were taken by a movement, beginning in Bavaria in 1920, and led by an Austrian, Adolf Hitler, General Ludendorff, and various monarchist-nationalistic politicians, as a counter-attack upon the republican and socialist revolution.<sup>1</sup> In 1922 a small group seceded from the German Nationals and formed the German Racial Freedom Party (*Deutschvölkische Freiheitspartei*). It will be observed that *I have translated the term 'Völkisch' by Racial: it might be translated 'National', but the party then, and subsequently, made race one of the chief features of its programme.* In 1924, arrived in the Reichstag, they named themselves 'National Socialist Freedom Party'. Their track in Bavaria, Mecklenberg and elsewhere had been, literally, blazed by armed force, and in November, 1923, they attempted a *coup d'état* in München.<sup>2</sup> It was unsuccessful. Yet no regular and intensive measures were taken against the leaders, who made no secret of their intention to win the State by main force and who ridiculed the democratic, parliamentary régime.<sup>3</sup> Moreover, they could win adherents by pointing to Communist excesses, and always the misery of the country! The French incursion into the Ruhr, the pressure of the Allies for reparations, the arrangements regarding Dantzic and Upper Silesia, the outcry of German minorities in Czechoslovakia, Poland and Italy—all stimulated a bitter and sullen anger, which redounded to the benefit of the movement.

A militant, violent, incessant propaganda was practised; men and women who stood in the way were murdered, a military organization was created to give satisfaction to the longing of the young and the unemployed and oppressed, for freedom and organized, gymnastic community. Large numbers of the youth of the universities were

<sup>1</sup> Cf. Hitler, *Mein Kampf*, 2 vols., Edn. 1931.

<sup>2</sup> Cf. Poetzsch-Heffter, in *Jahrbuch*, 1925; and account in Purlitz, *Geschichtskalender* for the last quarter of 1923 under *Bavaria*.

<sup>3</sup> Feuchtwänger's *Success* is a well-informed novel of these events.

attracted. A process of infiltration was attempted in the Army.<sup>1</sup> The Popular Initiative was used to overcome the Young plan, and its title, 'Law against the Enslavement of the German People', characterizes the spirit of revolt which seethed in Germany. The Initiative was lost, but millions voted in favour of it. In 1930 about 35 million votes were cast in Germany against about 31 million in 1928. In this election, moreover, compared with 1928, the Social Democrats dropped about half a million, the German National Party lost *about two million votes*, but the Conservative and other proximate Groups almost made up for this by an increase, the Centre slightly increased, the German People's Party lost *one million votes*, the Democratic Party lost about *one-quarter million votes*, the Communists *added one and a quarter million* to their votes. The National Socialist votes increased from 800,000 to 6½ millions. It is clear that a large number of the non-voters must have become voters for the National Socialists (though others went Communist), that the Social Democrats may have lost to the Communists and the National Socialists, and that the German People's Party was outbidden by the National Socialists. The two radical wings of German politics, the National Socialists and the Communists—the two expressions of ferocious discontent with Capitalism and Parliamentarism were immensely strengthened. It is of significance that between 1924 and 1930 as many as 7 million young voters came on the registers for the first time; they and several millions between the ages of 25 to 30, know little of politics except the aftermath of the War and what the Germans call the 'dictatorship of the foreign enemy'. Dix says of these that they are tired of materialism and class war, and full of devotion and the 'Spirit of 1914'.<sup>2</sup>

What is the creed of the National Socialists? It has two main articles, Racial Nationalism, and Social and Economic Collectivism. The first implies the exclusion from German-citizenship and public rights of all non-Germans by blood, and the inclusion into a Great Germany of the minorities now included in the border States. Like a red streak there runs through the entire programme virulent hatred of the Jews.

'Only a member of the race can be a citizen. A member of the race is one by blood only, without regard to religion. No Jew can therefore be a member of the race.'<sup>3</sup> . . . Anti-Semitism is to some extent the emotional substructure

<sup>1</sup> Cf. Leipzig trial of 1930, where it is interesting to notice, a long discussion occurred on what constituted 'the State', or the 'form of the State'.

<sup>2</sup> *Reichstagswahl und Volksgliederung* (1931).

<sup>3</sup> Cf. Feder, *Das Programm der N.S.D.A.P., und seine weltanschaulichen Grundgedanken* (1930), from which these statements and citations are taken. 'The party as such represents the standpoint of a positive Christianity without binding itself to a positive denomination. It combats the Jewish-materialistic spirit inside and outside us. . . .' 'The great subverters, Jews and Freemasons. . . .' 'In spite of all anti-capitalistic outbursts of the Marxists, in spite of



of our movement. Every National Socialist is anti-Semitic, but not every anti-Semite will become a National Socialist. Anti-Semitism is something purely negative, the anti-Semite has, of course, recognized the bearer of the plague of nations, but as a rule this recognition is transformed only into personal hatred against the individual Jew and against the successes of the Jews in industrial life. In the best of cases anti-Semitism refers to the demand for the expulsion of the Jews from the State and economic life. How to do it and what is to follow the anti-Semite does not bother. If the spiritual foundations of modern Jew-sovereignty: "our good before the common good" and its material instruments of power, the system of the Jewish bank, loan and credit economy remain, even after an expulsion of the Jews, then sufficient Jewish bastards and "normal Germans" in their miserable mixture of races will be found to take the place of the Jews, and they will hurt their own people just as much as to-day the alien Jews do—and perhaps we will then put as many anti-Semites in those places formerly occupied by Jews.'

What does this farrago mean? It means that the party is race-proud, and like former German movements, finds Jew-baiting both racially satisfying and politically useful. Yet it must be admitted that the Jew is as much hated as a symbol in economic life as for himself. The party imputes to the Jews modern materialism (Karl Marx) and liberalism (as shown in the German Democratic Party and long line of critics like Börne, Heine, and Lassalle, and Preusz). The latter has produced the nonsense of democracy and parliamentarism, which is organized disruption of the State into a number of selfish, dishonest and office-seeking parties. The latter shows itself in the struggle of groups for their economic interests regardless of the national welfare, and in particular, in the system of banking, credit, loans, usury, and profiteering, controls and combines. The good National Socialist does not pause to inquire whether, in fact, but a very small proportion of the system is in Jewish hands, nor to ponder on the world-wide control of social economic life by Christians, nor on the fact that since Jews were practically excluded from public office before the Revolution they had no alternative but to take up business. However, the motto of the party is, 'Common good before individual good', and 'Its Corner-stone: the abolition of Interest-Slavery'. It agrees that the misery of the country comes about from the exploitation of labour by finance, and the pursuit of individual 'profit' instead of the common good. Then what would the National Socialist do? Insist upon German nationality and break with International Socialism; persuade, if not, compel, all the workers and others, to co-operate in industry and society not in the spirit of Marxian materialism but of cultural collectivism; not permit the uncontrolled growth of large businesses but run small, middle and large-scale business in harmony! It would denounce the peace-treaties of 1919

the pious phrases of the Centre, in spite of the outcry of industry against the burdens of taxation and interest—no clear recognition of the world-enemy: capital which overshadows the whole world, and the holders of that capital, the Jews.'

and after, and demand colonies. It would impose work upon every one in the State, not permitting unearned incomes. It would withdraw all war profits, nationalize the trusts, compel co-partnership in large industries, provide generous old age pensions, commercialize the great warehouses, socialize land without compensation,<sup>1</sup> execute usurers and profiteers, give scholarships to poor children, promote and even compel physical improvement, abolish a paid army and create a people's army, control the Press to exclude lies, by prohibiting non-Germans by race from editing or writing for a newspaper, or owning shares in a newspaper, it would prohibit newspapers which are against the public good, tolerate all religions unless they are against the public welfare or the 'ethical and moral sentiments of the German race', and *establish a strong central authority in the Empire*. Parliament is to be made ridiculous by obstruction, and elections by shock tactics. But why, fundamentally, are these necessary? Because the State has ceased to be a State, it is an 'Unstate', that is, the sense of cohesion and organic moral collectivity has, if it ever existed, departed.

Look upon the liberal democratic State! The spectacle disgusts:

'Associations, representative bodies of interests, professional, civil servants' and employees' associations, associations of small savers, dividend receivers, creditors of the Reichsbank; armed associations, ex-Service men's associations, guilds, clubs, co-operative societies, trade unions, peasants and agricultural societies, and whatever other names such bodies may have—reasonable in their fundamental idea!—foolish in the chaos of modern public life, attempt to produce order. In vain! for nothing is incorporated organically in society, in the higher wholeness of the nation. All are jealous of the attainment of small advantages for their own caste, or class, without any great political or economic guiding idea, helpless, and applying to as many political parties as possible, accepting the existing State and economic system, obedient and servile towards so-called authority. . . . Chaos and bewilderment! . . . Government against people, parties against parties, concluding the most curious and impossible arrangements, parliaments against governments, workers against employers, consumers against producers, merchants against producers and consumers, house-proprietors against tenants, workers against peasants, officials against the public, working class against the "bourgeoisie", Church against State, all fighting the temporary opponent with blind rage, and all with only one thing in view—their own personal interest, their power, their *own good*, the interests of the purse. No one thinks that the other has a right to live, nor considers that unscrupulous pursuit of their *own good* can only be attained at the expense of others, no thought for the well-being of their national kinsmen, no regard for the higher duties towards the community, no reserve in the breathless chase after personal enrichment. Elbows are dug into the neighbours' stomach in the battle for advancement, and for profit people climb over corpses—why have scruples? That is the modern economic spirit.'

<sup>1</sup> This appears to have frightened prospective clients, hence in 1928, the party let it be known that this was not really meant; it said it referred only to the creation of legal possibilities of expropriating land illegally acquired (in depreciated currency) or improperly cultivated from the standpoint of the public well-being. Programmes, unfortunately, are bound to dissatisfy some people!

There is no thought for the future of the State—‘enjoy while you can—after us the deluge!’ For this an organic sense of the State, and more, an organized and disciplined State, must be substituted: ‘The will to form, the will to cure chaos, to bring the world which has become unhinged into order, and as Guardian (in the highest Platonic sense) to administer Order—that is the tremendous duty which National Socialism has set itself’. This will produce the ‘true’ State.<sup>1</sup>

Yet, so far, the National Socialists have not developed their plan of the true State beyond the few phrases we have reproduced. Indeed, they take refuge in the statement that only when in office—having abolished popular government and substituted vocational assemblies—will they develop their policy. Indeed, they deprecate discussion of their policy on the grounds that ‘nothing is more dangerous for the existence and aggressive power of a political movement of our kind, than if negative criticism is exercised regarding its programme or if explanations must follow’. True! It is, in fact, clear that discussion would immediately raise such disintegrating difficulties as the form of the State, federalism or unitarism, the actual position of the workers in the State. It is not, however, the first time that strength has been acquired by silence, or office by the cry of *solvitur ambulando*. Moreover, when the parliamentary groups coalesce and form governments, when they are inevitably caught in the toils of Germany’s domestic Reich-State difficulties, in the uncontrollable causes of unemployment, and the unrelenting grip of the Allies of 1914–18, is the party not fortunate to be in opposition and a bitter critic? *Post hoc, ergo propter hoc* is the strongest argument in the world to the modern ignorant electorate: Governments, which are in spite of themselves very often the effects, are said to be causes, of distress; and how many disentangle true causes? Hence the cocksure, the militant, the exaggerators, the irresponsible distributors of promissory-notes, attain to power. So the party moves forward:

‘We National Socialists unfurl our flags of attack. We reach back to the dark dawn of Germanic pre-history, and ever young, radiant and inspiring there rises before us upon the circle of the sun, the Swastika (*Hakenkreuz*), the symbol of ever-awakening life. Our storm banners, our eagles carry this symbol: “We are the army of the *Hakenkreuz*, Raise the red flags on high: German labour on the road, to freedom we will lead!”’

**The German Democratic Party.** In the elections of 1930 the Democratic Party did not appear: it had coalesced with other

<sup>1</sup> Othmar Spann, author of ‘The True State’ (*Der Wahre Staat*) is appealed to here as the prophet. Spann goes back to the German Romantic School which denied the propriety of men doing what they liked with and for their own, and insisted upon the priority of collective welfare to individual good. Cf. Spann, *Types of Economic Theory*.

groups to form the German State-Party (*Deutsche Staatspartei*). In 1928, appearing in its own name, it had won twenty-five seats, but this number was the lowest level in its steady descent from seventy-five seats in the elections for the National Assembly of 1919. The party was founded in November, 1918, at the instigation of Hugo Preusz, by a coalition of the Progressive Party and liberal National Liberals, as a positive defence against the possibility of a Socialist bureaucracy. The Progressive Party (*Fortschrittler*) issued from the *Liberal Union*, a group of free traders and anti-Bismarckians, who seceded from the National Liberals when they accepted the Army Law of 1880, and radical liberals then called the 'progressives'.<sup>1</sup> In 1884 they took the name of German Independent Party (*Deutsche freisinnige Partei*). This body became the real and only opposition group in the Reichstag until the development of Socialist strength, and led by Richter, its attitude was that of Gladstonian Liberalism—*laissez-faire*, anti-militarism, free trade, retrenchment. In 1893 the party was split into two groups, the Richter group still in opposition, and another group less uncompromising with the policy of military strength and Colonial expansion. The Richter group moved leftwards and in 1898 voted with the Social Democrats against naval appropriations. About this time the Progressives were reinforced by the accession of numbers of voters who had followed a group of social reformers (Pastor Friedrich Naumann, and Max Weber and Hellmut von Gerlach) in a national socialist direction begun in 1896, and were influenced by socialist doctrines. Partly under the influence of this movement, and partly as a defence against the Conservatives, the two liberal groups became once more a united Progressive Party in 1910. In 1912 they were able to make an electoral arrangement with the National Liberals. Whereas the latter were governmental until the last during the War, the Progressives gravitated earlier to the Left. Then came the coalescence of Progressives and Left National Liberals in the Democratic Party, co-operation in the revolutionary government with the Social Democrats and the Centre, and the drafting and passage of the new Constitution by Hugo Preusz. It is against this party that the National Socialists are bitterest,—if there are degrees in its bitterness, for this is the party of philosophical liberalism and parliamentarism, and included and still includes many Jews, such as the *Berliner Tageblatt* and the *Frankfurter Zeitung* groups. It is said to be the party of commerce and banking, and found its way to obtain Colonial concessions under the old régime. It played a mediatory, liberal rôle in several governments, and is the essential defender of the Weimar Constitution<sup>2</sup>—its parliamentarism

<sup>1</sup> They were very strong followers of the doctrine of *laissez-faire*, and among their leaders was Dr. Max Hirsch, who established the non-socialist, Liberal, trade unions. These still exist.

<sup>2</sup> Cf. Programme, Dec., 1919, Salomon, III, 85 ff.

and its 'fundamental rights', which, indeed, were produced by Friedrich Naumann.<sup>1</sup>

The party found its strength in the interests of commerce, shipping and the Stock Exchange, the middle classes of the large towns, and members of the free professions. Its parliamentary representation (1912) was composed of agriculturists (mainly intermediate and small), 11.9 per cent. ; business men, 16.7 per cent. ; officials, teachers, lawyers, etc., 57 per cent. ; secretaries of companies and trade associations, 4.8 per cent. ; physicians, journalists, rentiers, 7.2 per cent.<sup>2</sup>

Its life began to ebb soon after the making of the Constitution, for two reasons : it lost its most creative leaders, Naumann, Weber,<sup>3</sup> Preusz<sup>4</sup> and Rathenau, and the politics of Germany were radicalized by her world position. Who wishes to listen to moderating reasons, which is the essence of liberalism, in a time of panic ? The Economic Party of the German middle classes, the *Volksrechtspartei* (concerned with the effects of the laws on depreciation of monetary values) and the various racial parties, and several small groups like the Party of House-Proprietors and Dividend Receivers went their several ways. In July, 1930, the State-Party was formed out of the Democratic Party, the young *Volkspartei* members, and a more conservative group called the *Popular National Reich Association* (*Volksnationalen Reichsvereinigung*). The intention was to counteract the subversive extremes on the Right and the Left, and to produce a single group strong enough to overcome the fragmentation of bourgeois strength in the Reichstag. It sought to unite the people on a non-religious, non-economic, non-caste, non-class basis. It especially combated the electoral system of proportional representation with rigid lists, which promoted a multiplicity of parties, and severed the connexion between member and voter owing to the largeness of constituencies and the existence of a Reich List. It desires reform of the Federation, to abolish irrational frontiers and State parliaments. Local self-government is to replace State autonomy. National self-determination is essential. A peaceful revision of the Versailles treaties must be carried out. Freedom in cultural matters, yet a uniform basis of education throughout the Reich, is to be established. The party desires encouragement of economic productivity through controlled use of capital, aid to the middle classes, just distribution of the burden of taxation, municipal financial freedom, an energetic commercial policy, tax equality of public with private industry, encouragement to renewed efficiency in agriculture, the development of State social services. It recognizes the significance of Trade

<sup>1</sup> Cf. theories in the National Assembly [short statement is found in Beyersdorff, *Die Staatstheorien in der Verfassungsgebenden deutschen Nationalversammlung* (1928)].

<sup>2</sup> Kamm, op. cit.

<sup>3</sup> Cf. Biography by his wife, Marianne Weber.

<sup>4</sup> Cf. Feder, *Hugo Preusz*, and Carl Schmitt, *Hugo Preusz*.

Unionism and calls on employers to do this also, and approves of the maintenance of industrial arbitration.

In the elections of 1930 this party obtained a little over  $1\frac{1}{2}$  million votes and twenty-two seats; in 1928 the Democratic Party had had  $1\frac{1}{2}$  million votes and twenty-five seats. It can hardly expect great successes until people are more convinced of the need for concessions to each other for the united good. That can hardly come until disaster is met as a result of intransigent policies and the crippling of the political machinery.

**The German Social Democratic Party** (*Sozialdemokratische Partei Deutschlands*). The Social Democratic Party of Germany had its immediate origins in two sources, the doctrines of Ferdinand Lassalle and Karl Marx. The influence of Lassalle began with his 'Open Letter to the Workers' of 1863; the latter's influence operated through the individuals and committees who came into contact with Marx and Engels.<sup>1</sup> Neither of these thinkers worked on entirely fresh ground; secret societies and workers' educational societies had come into existence long before, as democratic radicals, and as organizations of workers in domestic and factory workshops in the growing industrial districts. Lassalle suggested to the assembled associations at Leipzig: (a) the formation of an independent labour party, since only this would assure them the attention of the legislature, (b) that they would obtain no permanent and substantial good from voluntary institutions for self-help (like savings bank and credit societies), but must proceed at once against the 'iron law of wages', which permitted them only a minimum existence wage, while the surplus went to the employer.<sup>2</sup> This law was only destructible if the workers themselves became entrepreneurs. Towards this end, the first step was the establishment of producers' associations which would get credit from the State. But how get hold of the State? by organization and universal and equal suffrage: nothing could resist the determination of 90 per cent. of the voters. Lassalle, then, placed emphasis upon the parliamentary struggle. The General German Workers' Association was founded, in its origin weak and with little resources. In 1867, 40,000 votes were obtained by the candidates of the Association in the North German Confederal Elections.

Yet another rivulet flowed both from the South and Middle German Workers' Education Association run by August Bebel and Wilhelm Liebknecht, the former republican and moving Socialist-wards, the latter a journalist who had become a member of the Communist Party while in England as language teacher and correspondent. Both later joined the Communist International. Candidates were

<sup>1</sup> Cf. Mehring, *Geschichte der Sozialdemokratie*, I.

<sup>2</sup> Cf. the Analysis of early Wage Theories of the Classical Economists in Cannan's *Theories of Production and Distribution*.

run, and in 1867 four, including Bebel and Liebknecht, were elected. Workers' Associations grew up all over Germany, and became involved in the International. In 1869 the Lassalle and the Bebel organizations united at Eisenach under the name of the *Social Democratic Workers' Party*. The party is to fight against unjust political and social conditions, and to abolish class-rule. It sets out to abolish the wage system and replace it by co-operative work which could exclude economic slavery. To secure this, political control is essential; and since the proletariat is not a local but an international phenomenon the party is a branch of the International. Immediate ends are the suffrage and payment of members, direct legislation by the people, abolition of privileges of caste, property, birth and religion, a people's army in place of a paid army, separation of Church and State and School and Church, compulsory and free education, judicial reforms, and freedom from restrictions on the Press, meetings and association, a shorter working day, limitation of women's and children's work, abolition of indirect taxes and introduction of a single, direct progressive income tax and inheritance tax, State promotion of co-operative societies and State credit for them. This programme shows the very strong influence of Lassalle, but already there is a dash of Marxianism—in its inter-nationalism.

The two wars of unity in Germany at first awakened the national patriotism of the Northern section of the Party, but the Commune of Paris changed the Socialist mind into one of strong denunciation of nationalism and patriotism. It was this 'Fatherland-hate' which produced a little later *national* Socialist groups in opposition to the international socialism of the Social Democratic Party. The newspapers of the Party, *Der Neue Socialdemokrat* and the *Volksstaat*, began to speak of Communism and Revolution. Bebel and Liebknecht and others were sentenced to several years' imprisonment. Under fire, the Eisenachers and the Lassalleans coalesced fully at Gotha in May, 1875. The new programme follows that of Eisenach, but with an extra strong dash of radicalism—it begins with the declaration that

'Labour is the source of all riches and all culture, and since generally useful work is only possible through the community, the whole product of labour belongs to all the members of the community, the obligation to labour being universal, on an equal basis of right, each according to his rational needs.'

The rest is social reform and Lassallean. The means to communalisation of productive apparatus was to be 'legal', but later the word 'legal' was cancelled. The influence of Marxianism was winning—internationalism; the disbelief that out of spontaneous idealism unsupported by economic interests the ruling classes would concede their power and position; violent overthrow of the existing system.

In 1877 the Party had already twelve Reichstag seats. *Vorwärts*

was founded. Then came Bismarck's onslaught on the Socialists, begun on the favourable occasion of an attempt on the life of Emperor William I. The 'Laws against the common-danger of the Social Democratic Movement' came into force in October, 1878. By Bismarck the laws were directed against 'the depravity of a troop of bandits'. The attack was carried out with power against membership, and agitation (by writing or speech), of societies which attempted to overturn the existing State or social order. The party and its units were dispersed by deportation, imprisonment, prohibition of all issues of the Press, and the cruellest industrial victimization. An unorganized, secret and violent movement took the place of the organized and public movement. Newspapers were smuggled in from Switzerland and England, or printed secretly.<sup>1</sup> The dozen Socialist members of the Reichstag maintained a steady fight against Bismarck. Money was secretly gathered. The battle continued until 1890; but all the force employed was unable to stem the tide. Bismarck had insufficient policemen of adequate intelligence to overthrow such a widespread, determined and capable resistance. Moreover, Socialist feeling was too strong, and by 1890 the seats in the Reichstag increased to thirty-five; the votes were quadrupled.

Marx and Engels had been very severe critics of the Gotha programme: it had insufficient force, did not accept the full doctrine of class-warfare, because it still floated about in the belief that political ideals and government were based upon the ethical consciousness, whereas the Marx-Engelian doctrine was the necessary determination of all behaviour by the economic element. Their private criticisms lead, especially in the time of the Socialist Laws and the exile of Socialist leaders, to a new formulation of the Social Democratic programme.

*Marxian Politics.* This programme was made at Erfurt in 1891, and is pure Marxianism tempered with certain concessions to parliamentarism. The main doctrines<sup>2</sup> are (1) the Concentration Theory, (2) the Accumulation Theory, (3) the Improvisation Theory, (4) the Crisis Theory, (5) the Theory of Inevitable Catastrophe and Revolution, (6) the Theory of the arrival of a new State based not on hopes or ideals, but on a new economic basis. The Concentration Theory says that quite naturally economic development must lead to the destruction of the small trader, who becomes a propertyless wage-earner (or proletarian) commanded by a few capitalists and large estate-owners. Then follows the period of accumulation; great, gigantic trusts come into existence, but the capitalists and large estate-owners monopolize the advantages. The workers are increasingly impoverished, their number and the number of surplus workers

<sup>1</sup> Scheidemann's *Memoirs*, I, give a good personal account; Mehring's is the more complete.

<sup>2</sup> Mehring, *op. cit.*; Salomon, *op. cit.*, II.



increases, and a bitter and critical class-war breaks out between *bourgeoisie* and proletarians, exploiters and exploited, and modern society becomes divided into two enemy camps, 'the common characteristic of all industrial countries'. This battle is made the fiercer by the industrial crises which occur ever more often and more sharply and make general insecurity the normal condition of society, and demonstrate that private property is no longer controllable in the interests of its proper use. The Marxian doctrine then proceeds, that this situation leads to breakdown and the rise of the workers, who expropriate and collectivize the means of production and the methods of distribution. Formerly the capitalists were the State: now the workers became the State: there is a dictatorship of the proletariat. Behind all this are two tremendous generalizations: (a) that all the social institutions of mankind and all moral development were the direct result of economic causes only; (b) that the State was the organization of dominion in the hands of the economically powerful for their exclusive use. But the Erfurter Programme did not proceed thus far. It says that this socializing process is to take place—but not by itself. There must be organization and agitation: and this through political rights. Even Marx had to admit that agitation was necessary to accelerate progress towards the day of Revolution. Hence, it wants universal equal, direct and secret suffrage for all (men and women) over twenty; it demands the redistribution of constituencies according to the latest census,<sup>1</sup> proportional representation, triennial legislatures, and all the governmental devices of radical liberalism together with a far-reaching code of labour legislation.

With this programme the Party proceeded to great triumphs. By 1914 it had eighty-eight daily newspapers with about one and a half million sales. The trade unionists who had followed the Marxist doctrine and the Social Democratic Party now numbered about 2½ million with fifty-six trade union periodicals. In 1914 the votes cast for the party amounted to 4½ million, and had their seats (110) been in proportion to these votes they would have had 134 seats or over one-third of the total membership of the Reichstag.

Difficult problems confronted the party. Should it co-operate in parliamentary activity, as Lassalle had urged, or act as a purely agitatory, demagogic organization, as Bebel and Liebknecht desired, on the Marxian assumption that the capitalistic world-order would fall of itself? The Erfurt Programme, it must be admitted, was Marxian plus parliamentary democracy and social-reformist. It was

<sup>1</sup> Existing distribution was a tremendous handicap to the Social Democratic Party, since its strength lay in the industrial towns, while the constituencies were laid out in 1869 on the basis of the contemporary distribution of population. This gave the advantage to the Conservative Party. Cf. Bock and Kamm, *op. cit.*, also footnote on p. 409.

seen, especially by the trade union members and leaders, that immediate returns were to be obtained by parliamentary co-operation, and not much by sporadic strikes and outbreaks on May-Day which the Left Wing so ardently advocated. A subsidiary question was the relationship between Trade Unions and Party. The party had its independent membership, although, of course, the same men were in most cases members of both bodies ; it was not, like the British Labour Party, actually made up of the Trade Unions. Hence it could be very self-opinionated, and move along radical and ideal paths without reference to the immediate demands of the Trade Unions. Many of the Left Wing Social Democrats used, or wished to use, the unions as organizing tools for radical purposes. Ultimately the party was forced to co-operate in the Reichstag with the Progressive Party ; yet unwillingly. The party refused the Presidency of the Reichstag because this would mean attendance at Court ; the Budget was regularly rejected. It was necessarily, however, a party of negation and impotence under the old régime ; and being this, it occupied itself the more with agitation, the creation of an enormous and rather unwieldy party system, educational associations, and a vast and complicated dialectic of Marxism. The party was in this phase concerned, not only with material successes, but with composing and inculcating a proletarian culture, and it prided itself especially upon its freedom from such stultifying conceptions as God and the paraphernalia of organized religion. The whole range of Marxian economics and politics was taught : the eternal class struggle, the theory of the production of value only by labour, capitalistic seizure of the surplus product over and above what the labourer obtained, the dependence of culture exclusively upon economic institutions. *Das Kapital* had by now amplified and systematized the early essays of Marx and Engels. The sociology of Marx was a perfectly simple thesis and every labourer could understand it : his discussion of 'congealed labour' values few have ever understood, but its broad meaning, that only those who serve society shall obtain their bread from society, was an axiom which went direct to the worker's mind.

As to deeds, the party necessarily could do little until the Revolution ; therefore, it had time for second thoughts, and, having this time, the revision of Marxism. This came to a head towards 1900, when Eduard Bernstein, having lived ten years in England and being influenced by the tenets of the Fabian Society, brought out his 'Pre-suppositions of Socialism and the Duty of Social Democracy' in 1899.<sup>1</sup> Bernstein's thesis was that both the material basis of Marxism and its prognostications as to the speed of capitalistic decomposition were erroneous, and that this vitally affected the tactics of social democracy. It was admitted, little by little, by Engels, that the breakdown would

<sup>1</sup> *Die Voraussetzungen des Sozialismus*, Stuttgart, 1899.

not come soon, for more, rather than less, people become proprietors, while the middle classes continued to exist and industry was not concentrated in all branches. Moreover, capitalistic privileges are surrendered or seized, as the evolution of social legislation proved. In proportion as political systems are democratized the less need is there for a catastrophic breakdown, and indeed, the less the opportunity. Even Marx and Engels had, in their correspondence, set aside the idea of a catastrophic change and admitted the need for the attainment of democratic power. What would come after the catastrophe, if there were one? The world must continue: how? This was not answered by Marx. Yet the question itself suggested that the only solution lay in one long evolutionary movement. In the Marx-Engels correspondence of 1890 and 1894 they had admitted that their original opposition of matter and consciousness was not so clear and strong as they had held—they admitted the influence of forms of law, political, legal, philosophical and religious doctrines and intuitions.

The certainty of the result produced by economic causes therefore cannot be accepted. The philosophical basis of the class war breaks down. Socialism, therefore, is not a purely economic product and certainly cannot be deduced from prophecies regarding increasing accumulation and concentration of capital: the divisions of society are many and graduated. The socialists must not wait until the middle class is absorbed by large capital: it may not happen. Small and middle enterprises have grown both in industry and agriculture. Hence an evolutionary socialism must be pursued, a policy of continuous, if small, gains.

The 'Revisionist' policy gained adherents and provoked a tremendous controversy: foremost among the Marxians was Karl Kautsky.<sup>1</sup> The party smartly rapped Bernstein over the knuckles in the Dresden Congress of 1903: it reiterated its belief in the class war and its basis in the observed development of society. Yet it was prepared now to use the other parties (no more than that, no coalition!) where these proffered immediate and significant benefits. It was a little cool regarding the co-operative society movement. All in all, it intended to make it clear that it was more interested in the ultimate attainment of a full socialist régime than in palliatives and petty concessions. The extreme wing was now stimulated by Rosa Luxembourg, the younger Liebknecht, and Clara Zetkin. They were destined, later, to break away and found a Communist Party. Short of revolution the Social Democratic Party, before the War, was forced into impotence and doctrinal hypertrophy, for political power did not rest with the parties.

The War caused a great change. Liebknecht, Haase, Ledebour,

<sup>1</sup> *Bernstein und das Sozialdemokratische Programm, Eine Antikritik*, Stuttgart, 1890.

Kautsky and Hilferding and others would not accept the War.<sup>1</sup> The majority remained governmental. By the end of 1916 an organized expulsion and secession occurred, and these members went into permanent opposition to the government and their former colleagues, suffering the usual persecution of the pacifist and revolutionary in war-time, and maintaining alive the socialist tradition against militarism, and nationalism, and denouncing the peace of Brest-Litovsk. The Majority Socialists walked into office at the Revolution, Ebert becoming Chancellor; the Independent Socialists co-operated for a few months. Here was the socialist opportunity. It was deliberately rejected by the Majority Socialists, who resolutely chose parliamentary democracy as prior to socialism. The main differences between the two wings of socialism were personal, those arising out of the War, and regarding the speed of progress.<sup>2</sup> On their left was the Spartacist group formed by extreme secessionists from the party under Karl Liebknecht and Rosa Luxembourg. It had drawn up a revolutionary programme in 1916 and started a journal called *Spartacus*, after the leader of the rebellion of Roman slaves. The Spartacists' programme was almost identical with Bolshevik communism. In January, 1919, the group became the Communist Party of Germany.

The Majority Socialists felt obliged to defeat the Independent Socialists and Spartacists by violence, since to them order and parliamentary elections were the necessary preludes to socialism by gradual stages and persuasion. The Councils of Workers, Peasants and Soldiers were swept away; indeed, they swept themselves away, for at heart the majority of socialist followers were republican rather than communist. The Majority Socialists joined the Centre and the Democratic Party to make the new constitution, and gave the task of making the new constitution to Hugo Preusz, a Democratic leader. However, the constitution contains at once a substantial measure of socialism and the possibility of complete socialization, when a majority of the German people desire it. They maintained, at least, the republican form of government, when violence might have permitted its overturn by the military caste. The Independents gained adherents by the sole force of their opposition and extremeness. Yet many were not prepared to go the way dictated by Moscow. This caused a division of their ranks. Twenty-two of the 81 Independent members of the Reichstag went into the Communist Party. Permanent opposition was impossible; and under the influence of Hilferding, Breitscheid and Kautsky the reunion of Majority and Independent Socialist parties was brought about.

In 1921 the Majority Socialists had proceeded to a re-formulation

<sup>1</sup> This is very fully treated in Scheidemann, *op. cit.*, II.

<sup>2</sup> Cf. Declaration of Majority Socialists to the Independents, reproduced in *Finer, Representative Government*, p. 75.

of their programme : thirty swift and revolutionary years had passed since Erfurt. The economic environment, the political machinery, the doctrines, had suffered tremendous changes. At Görlitz the party was compelled to take a difficult decision : publicly to reconcile the Marxian fables, which had attracted so many followers, with the need of parliamentary co-operation. The programme,<sup>1</sup> therefore, still speaks of class war and impoverishment, but it passes beyond the fatalism of Karl Marx, to insistence upon creative will as the means of social reorganization.<sup>2</sup> The party cannot any longer appeal as a *class* party, for it has accepted the majority principle—hence it claims that it is a party of all *creative* producers : ‘The party attempts the gathering together of *all* producers, by body and mind,<sup>3</sup> who are dependent upon the produce of their own labour, to a common creed and aims, to a common battle for democracy and socialism.’ The middle class is no longer mentioned as a kind of arch-enemy. There is no explicit declaration in favour of ‘full socialism’. A policy of entry into Governmental Coalitions was accepted ‘to preserve the republic-democratic form of the State . . . and to approach other socialistic ends’.

When the Independents returned to the party a new programme was necessary : it was declared and accepted at Heidelberg, in September, 1925, and is the official creed of the party.<sup>4</sup> Kautsky’s influence leaps to the eye : but though there is a return to Erfurt and Karl Marx, it is not a full return, ‘revisionism’ based upon the *position of socialism in a democratic State* gives pause, and this in two particulars, the fatalism of the Marxian creed is modified, and the intransigence of Marxism is transcended. We need not enter into the so-called *Programme of Action*, but only into Part I of the Programme, that is, *On Principles*. The ‘inward normality’<sup>5</sup> (instead of the Erfurter *natural necessity*) of economic development produces the reinforcement of capitalistic large scale production. Small industry is suppressed : a class of proletarians is created. A few capitalists have the monopoly of means of production. Does this, according to the Erfurt programme and Marx, necessarily produce the impoverization of the working classes ? Not quite : now there are only ‘uninterrupted *tendencies*’ to impoverishment. Is the class war an inevitable result of this ? According to Marx, Yes : for as Hegel showed in his explanations of world-development,

<sup>1</sup> A convenient summary of changes of programme is in van den Boom, *Die Sozialdemokratische Partei Deutschlands im Lichte ihrer Parteiprogramme* (1926).

<sup>2</sup> ‘Mightier than ever arises the will to vanquish the capitalist system. . . . To show the will the way thereto . . . is the task of the Social Democratic Party.’

<sup>3</sup> Cf. British Labour Party’s ‘producers by hand and brain’ introduced in 1918.

<sup>4</sup> Cf. the official edition of the *Heidelberger Programm*, with explanations, published by the party. Kautsky explains the ‘Principles’.

<sup>5</sup> ‘*Die innere Gesetzmäßigkeit.*’

the Spirit moves in one direction (thesis), then a reaction sets up in the opposite direction (antithesis), and a synthesis produced by the result of their contest determines the result in terms of civilization. So Marx; but his explanation, though as fatalistic, is not *cultural*, but *economic*. Erfurt went this way; not quite so Heidelberg: increasing impoverishment can be warded off, the position of the working classes may be improved, if only by constant battle. This, surely, is a modification. Yet later on, the programme takes up again the idea of the 'ever more embittered class-war'. Yet the classes are not now pitted against each other in the old Marxian narrowness; for now, with the growth of big industries the number and significance of employees and intellectuals grow. These, however, cannot attain the privileged positions—and therefore, their interests 'are bound up in an increasing measure with those of the rest of the workers'.

The theory of crises and insecurity appears in a slightly modified form as a 'tendency'. The development of capitalistic monopolies, cartels and trusts, and the process of amalgamation of industrial, commercial, bank and financial capital is more pronounced than in the Erfurt programme. The only help is in socialization of the means and processes of production. All this, however, has to be expressed and implemented through parliamentary machinery:

'In the democratic republic labour possesses the form of the State whose maintenance and improvement is an indispensable requisite for its fight for freedom. It cannot realize the socialization of means of production without coming into possession of political power.'

Now many problems are incidental to such a programme, yet they could not be either stated or adumbrated therein—for a party programme is a statement for millions of men and women who are not scholars, and, moreover, it suffers, like written constitutions, from other necessities of brevity. For example, would such socialism operate through a centralized bureaucracy, or in other forms? Such questions could only be discussed at the conferences and in the party organs. This particular question was answered, again, in broad terms by Hilferding at the Conference, when he said that a system of 'economic democracy' was the proper solution—i.e. a system of self-governing, decentralized workers' councils. Would consumers be represented? This is as yet unanswered. As to tactics? Both Scheidemann and Hilferding pointed out the possibility of conducting the class war by *civilized* methods, i.e. through the democratic system.

One of the greatest difficulties facing the socialist movement, especially acting through the majority system, is agriculture, and especially, the small peasantry. The independent, middle and small peasantry comprise about 15 per cent. of the population, and a special party, the *Deutsches Landvolk*, seeks to represent them and

defend their interests. The Heidelberg programme has certainly not grasped this nettle, so painful to the Bolshevik leaders in Russia ; it is content to frown upon large estates, which are operated on a capitalistic system. It speaks only of the ' withdrawal of the soil, land, natural resources and power, which serve the production of energy, from capitalistic exploitation and their transfer to the service of the community '.

The main lines of the Social Democratic policy are then : Socialism as the cure for the evil effects of modern industrial, commercial and financial concentration, but produced step by step through the parliamentary system. It stresses the good of the community over that of the individual, and pursues a policy of cultural as well as social improvement through the State until such time as it shall gather a majority of all voters. It supports a centralized Reich with local self-government, the abolition of privileges of birth, sex, religion and property. Administration is to be democratized, remedies against illegality of administrative action established, municipalization of business enterprise extended. It has many immediate demands, like that of the eight-hour day, an annual holiday, tending to the improvement of the condition of the working classes. It advocates a humanitarian criminal justice, and reforms in the matter of marriage, divorce, and the treatment of illegitimate children. Its educational policy induces full and free opportunities for all, and *secular* instruction only, and is strongly opposed to any publicly admitted right of the churches to influence the schools. It denies the right of churches to receive financial assistance from the State. Its financial policy is based on direct taxes, and it urges publicity for assessments and strict obligatory examination of accounts. The party supports economic and factory councils in which the workers may acquire a say in the direction of industry : this, in co-operation with the trade unions, the co-operative movement, a free-trade system through tariff treaties. It is a party of international affiliations, and supports national minorities, international disarmament, the League of Nations, and the backward peoples against exploitation. Its policy is, therefore, very much that of the British Labour Party, except that it rests upon a consciously accepted Marxian doctrine, which gives it cohesion and fighting force.

Two things require mention : its position in politics since 1919, and the nature of its composition. As regards the formation of governments, its policy has been to enter or stay out of coalitions according to the contemporary need of combatting aggressive reaction and compelling concessions either from other groups or (when it has decided to remain in opposition) from the Government. It has never been in coalition with the German Nationals, and only rarely with the German People's Party—the strain between the two would

be obviously too great, and when it was in coalition with the latter it was in order to help to withstand the most serious onslaughts on the Republic from domestic extremists and foreign aggressors under the premiership of Stresemann. Its usual colleagues have been the Democrats and the Centre, its friends of the Weimar Assembly. This collaboration has undoubtedly done it harm: it has sent the discontented and the young into the National Socialist or the Communist ranks. The policy of co-operation is not without strong critics: but to follow them involves revolutionary tactics or such a disorganization of the present constitutional machinery as to provoke revolution on the Right and the extreme Left. To combine revolutionary ends with peaceful means in a country seething with discontent is the hardest task a party may be given.

The Social Democratic Party gained very much permanently from the redistribution of constituencies and Proportional Representation. In 1912 they obtained 110 seats out of 397; since 1919 their proportion of seats has been as follows:

	National Assembly, 1919	June, 1920	May, 1924	Dec., 1924	May, 1928	Sept., 1930
<i>Total of Seats</i> . . .	421	459	472	493	490	576
Social Democratic . .	163	102	100	131	153	143
Independent Socialists .	22	84	—	—	—	—
Communists . . . . .	—	4	62	45	54	76

The party is in a generally strong position, but it is particularly strong in Prussia. In Prussia it has (since 1928) 136 seats out of a total of 467, and since 1925, it has conducted the Government under the Socialist Otto Braun, in coalition with the Centre and the Democrats. It has a fairly solid foundation of Trade Unions, and even members of other trade union systems like the Christian and the Economic Peace Unions vote for it.

The Social Democratic Party has, more than any other party, trade union and party officials in its parliamentary strength. In 1924 these two classes composed over 40 per cent. of the total—party officials amounting to 16 per cent. and trade union officials to 23 per cent. Other occupational groups represented are agriculture, none at all; business men, about 2½ per cent.; *officials, teachers, lawyers, etc.*, 14.5 per cent.; *writers and journalists, nearly 30 per cent.*; workers and employees, 9 per cent. Writers and journalists, trade union and party officials together number over 70 per cent.—perfectly comprehensible, since these constitute the professional attendants of a machine so vast that the ordinary worker can only confront it as an incapable amateur, and the educated and intellectual pioneers and popularizers in charge of an enormous daily and periodical press, research institutions, propaganda meetings and conferences, and parlia-



mentary tactics. These alone, too, have the necessary knowledge and experience for dealing with other organizations and the departments of State. Not that they have a welcome from all members of the party—for they are sometimes suspected of personal careerism, and their socialism is thought to be ‘sicklied o’er with the pale cast of thought’. Yet they are often more passionate Socialists than many average trade unionists. Such occupational groups are found not only in the Social Democratic Party, but also in considerable numbers in other parties, especially since the promotion of the growth of party organization by the republican constitution and proportional representation: The first class (party and trade union officials)<sup>1</sup> formed (in 1924) 23·5 per cent. in the German People’s Party, 15·3 per cent. in the German National Party,<sup>2</sup> 30 per cent. in the Centre Party, and 19 per cent. in the Democratic Party.

**The Communist Party of Germany.** In proportion as the Social Democratic Party accepted ‘the inevitability of gradualness’ and of coalition with ‘bourgeois’ parties, a place opened for a party on its Left, to occupy the extreme Marxian position. This was taken by the Communist Party of Germany (*Kommunistische Partei Deutschlands*). Even Karl Kautsky, once the defender of the pure tradition against ‘revisionism’, had arrived at a position midway between this and Bolshevism—as is shown in his work *Demokratie und Diktatur* of 1918, and his later co-operation in the Heidelberg Programme. The Russian example worked strongly upon Luxembourg, Liebknecht, Zetkin, the veteran Mehring, and minor leaders. The rise of the Independent Socialist Party in 1917 could not entirely satisfy these, and the Spartacus group was formed to pursue the tactics of using the war situation to provoke a popular rising. In December, 1918, they founded the Communist Party. It denied the possibility of attaining a communist State through Departments, Commissions or Parliaments—‘it could only be taken by assault of the masses and carried through’, and only if all the workers participated and did not leave the work to a few leaders. A policy of mass, and continuous, political and industrial assault was declared.<sup>3</sup> A decided attitude was taken to other interior problems: complete Federal unity, abolition of parliaments and establishment of Workers’ Councils, far-reaching social reforms, a six-hour day, confiscation of all royal estates, repudiation of all public debts, expropriation of all industries and capital in all its forms, or as the phrase goes ‘expropriation of the expropriators’.

The party decided not to participate in the electoral campaign for the National Assembly. Soon, however, it was seen that as

<sup>1</sup> In the case of the parties of the Right, officials of Chambers of Commerce, Employers’ Organizations, or salaried employees of big firms.

<sup>2</sup> Here are officials of the agricultural unions and agricultural societies.

<sup>3</sup> Cf. Salomon, *op. cit.*, III.

parliamentarism had come to stay, and that the masses were not revolutionary, the party must become parliamentary and seek to attain its ends by using election campaigns as regular means of agitation and of forcing concession from the other parties when they were in good tactical situations. The policy was officially declared in the Conference of October, 1919. When the important and decisive weapons can be used in the class war, ran the argument, they shall be used : but when, as used, mass-demonstrations and strikes cannot win, then Parliament *must be made use of* : 'The question is purely a tactical one. . . . Participation in parliamentary elections and activity merely serves the end of preparing "direct action" by agitation and organization.'

From 1920 the party has participated in all types of elections, local, State, Reich, workshop and trade union, and is almost everywhere represented. Like the 'Nazis' they have exploited every misery of the country, domestic and foreign : the reparation payments are the imperialistic oppression of the workers by the capitalists of other countries ; that the other parties, including the Social Democratic, accept them is a sign of their fundamental unity with the exploiting capitalists. The Social Democrats are blackened because they have participated in bourgeois coalition governments. The Social Democratic Party is embittered against the Communists because these win votes and seats from it. The Communists deny the usefulness of all other parties : these are prepared to sell their convictions, and more, the interests of the working classes, for ministerial posts : they refuse the eight-hour day, real peace in world affairs, just taxation ; they form the 'exploiting class' and fight the Communist Party because it is the true and uncompromising representative of the workers. The party's election manifestoes are couched in the extremest language of incitement to subversion of the State. The economic disorganization and impoverishment of the country is related directly to the capitalistic system in the approved *post hoc ergo propter hoc* style. Its processions and demonstrations are ceaseless and provocative, its penetration of the factories in the agitation of 'factory cells' continuous, and besides an organization by constituencies it has an organization by workshops. There are constant conflicts with the police and the party demonstrations of the extreme Right. During the Ruhr invasion an uprising was projected, but not carried out when it was realized that the other parties would not co-operate.

The ideological basis of the Communist Party position is little, if at all, removed from Marxism.<sup>1</sup> The theories of concentration of

<sup>1</sup> Cf. Election manifestoes, reproduced almost verbatim in Purlitz, *Geschichtskalender*, from time to time, under the rubric *Die politische Parteien*, and *Programm der Kommunistische Internationale*, 2nd Ed., 1930, which was sent to me in response to my request for a copy of the Party's programme and constitution.

capital, impoverishment of the workers, exploitation, the class war, international imperialism, appear, but in an ever sharper and more uncompromising form. The party remarks that the difference between them and the Social Democrats is that the Social Democrats are prepared to accept whatever mercies come to them from the parliamentary system and in coalition with other parties, whereas they, the Communists, argue that these mercies cannot, at their maximum, amount to much, *since the possessing and ruling classes have never surrendered a monopoly except under violence or threat, certainly not through persuasion or conscience*, and, therefore, they use parliament and the trade unions as means to a revolutionary end. The party does not accept the black-gold-red flag of Weimar, but the Red Flag of international communism! It considers its duty to be the constant invitation to and pressure upon the Social Democratic Party to form a 'common front' (*Einheitsfront*) to move along a path dictated by the Communists. It stresses its international nature, and points to the contrast between this, of the Third International, and the Social Democratic internationality in the Second International. It now sees the newer problems of dealing with the Press, the Theatres and the Cinema, which drug the worker and fill him with an 'ideology' bad for him and good for his opponents. It is more insistent than the old Marxians upon the brotherhood of all races and the importance of revolutionizing and elevating the colonial proletariat. The problems of currency, credit and international markets have made it wary of promising everything as soon as the workers commence their dictation—time for arrangement will be necessary. So, too, with all the different economic groups—like small peasantry, handicraft workers, who have customs, traditions and prejudice which cause them to produce in their present measure. So, too, with the technical experts—these must be won, not antagonized. Great caution must be exercised in re-organization—for all the cogs of the apparatus, Soviets, Trade Unions, the Co-operative Societies, must co-operate: this they can only do by the unifying action and leadership of the Party of the Proletariat.

In the end all will depend upon the cultural quality, that is, the mentality and spirit, of the workers and particularly their leaders. For to admit the impossibility of ever becoming economically better off than others, and the necessity of working under a collective, compulsory system, with no right of initiative independent of the commands and needs of the 'government', is to admit the need for the inculcation of a spirit of self-sacrifice and devotion to the public weal.

'Only in the measure in which the proletariat places its most advanced group in all the collective "positions of command", only in the measure in

which these groups increase in number, and attract new members of the proletarian class by the process of cultural transformation, until they do away with the divisions into "advanced" and the "backward" sections, only in this measure can the proletariat secure the victorious establishment of socialism and erect a defence against bureaucratic stagnation and class degeneration.<sup>1</sup>

This, in fact, involves a merciless and incessant battle against religion—'opium for the people', against the position of existing churches, and all organized faiths, except its own—a scientific-materialistic attitude of mind. The final phrases of the Communist manifesto of 1848 are oft repeated :

'Communists scorn to hide their opinions and intentions. They openly declare that they can only arrive at their object by a violent overthrow of the existing social order. The ruling classes may tremble at a communistic revolution. But the proletariat have nothing to lose except their chains. They have the world to win. Proletarians of all lands, unite !'

Of what will come after, the bondage, the deprivations, the daily toil for ends not universally accepted with happy acquiescence—there is no word, save a roseate and obscure picture of joy in the Soviet Republic of Russia. But we have already said that the enthusiast senses only the joy in sacrifice, for the sacrifice is none to him ; nor can he represent the burden of its drabness and drudgery to others, for he knows it not, but neither can he conduct its quickening inspiration to the average millions. Yet they follow, for there is injustice, and, perhaps, the promised land of rest from burdens may exist.

The party has kept itself out of coalition with any parties, even the Social Democratic : and has made it impossible for the Social Democratic Party to unite with the Centre and Democrats, by refusing its tacit parliamentary support in the case of a vote of no confidence by the parties of the Right,<sup>2</sup> and has compelled it to go more to the Right for coalition than it would have liked. It put up its own Communist candidate for the Presidency in 1925, and refused to coalesce with the parties of the Left. But in the campaign for the Referendum in favour of expropriation of the Royal Princes it made common cause with the Social Democrats, leading the way and issuing some of the most fiery pamphlets. Moreover, in August, 1931, it co-operated with the National Socialists in an attempt to get the Prussian Diet and Government (Social, Democratic, and Centre) dissolved by referendum.

Its parliamentary strength since 1920 has grown thus :

1920	1924	1924	1928	1930
4	62	45	54	76

Its strength is naturally greatest in the large factory and shipbuilding

<sup>1</sup> *Programm*, p. 55.

<sup>2</sup> *Die Sozialdemokratie im Reichstag*, 1925, Official Annual Publication of the Party.

centres : e.g. Berlin, Potsdam, Magdeburg, Thuringia, Westphalia, Düsseldorf, Hamburg, Chemnitz—the potential reservoirs of Social Democratic followers—and there is clear evidence, when constituencies are compared in 1928 and 1930, of the loss of seats by this party to the Communists. Its strength is nourished by funds from Russia.

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**Survey of German Parties.** Let us stress certain general characteristics of German political parties. They build up remarkably efficient propaganda organizations, with large bureaucracies of party officials. Their machine-like and oligarchic character has been well analysed by Robert Michels,<sup>1</sup> and deplored by one who had to reckon with its strength, Bülow.<sup>2</sup> To-day it is almost universally deplored by the younger members of the parties, and those who belong to no party, because it automatically prevents the younger members from rising to leadership. Although, at the present time, the continuation of the party system is clearly promoted by proportional representation, which gives the leaders the power to decide who shall be a candidate and what position he shall occupy on the party ballot-list, this characteristic was present several decades ago, and it is due to the general quality of discipline, a product partly of race, and partly of the cultural and military reactions to continental location in the midst of a number of hostile nationalities. The outcry against the inflexibility of parties is very great, and especially against the paid leaders—the *Parteibonzen*.<sup>3</sup>

Secondly, the parties are highly doctrinaire when compared with English and American parties, and this in two senses : (a) they support their actions and propaganda in long programmes, by a system of doctrine reading back from the merest daily detail to ultimate metaphysics, and (b) they hold themselves, as far as possible, separate in all their activities, parliamentary and social, from those of any other party creed. Why is this ? It is partly because the parties are new and therefore conscious, and must explain their right not only to existence but to political authority. They appeal, no doubt, in the way they believe they can best appeal, more largely than elsewhere, to ultimate reasons. Further, they were born in an autocratic state, and the critic, at any rate, is impelled, like Rousseau, Voltaire and Paine, to examine the ultimate assumptions of the powers that be, and to state his own. Nor can we omit the powerful influence of the great philosophic systems, those of Kant, Hegel, Fichte, Stahl and Marx. These systems, whatever we may think of their

<sup>1</sup> Op. cit.

<sup>2</sup> *Imperial Germany*.

<sup>3</sup> Cf. Röder, *Parteien und Parteienstaat in Deutschland*, 1930, for a recent description of the organization of German parties. Cf. also the interesting lectures by eminent representatives of the parties in *Volk und Reich der Deutschen* (ed. Harm\*), 1929, II, and especially the introductory lecture by Professor Gerhard Ritter.

validity, are remarkable for their comprehensiveness and the extraordinary vigour of their logic. Are these not merely the abnormal specimens in a general cultural system which happens to include comprehensiveness and logical vigour as important constituent elements? This in itself tends to make for intransigence—but intransigence is not composed only of this—our third point will partly explain it.

Germany was not as fortunate as England in settling her main constitutional problems over two centuries ago. England's party system had its origins in a time when society, or political society, at least, was socially and economically homogeneous. Its twofold division persisted until comparatively recent years, since it was untroubled by territorial differences, religious differences or economic dissension. Now, however, economic differences are straining the parties. But in Germany the parties came into existence just when economic division of labour and interests was most patent and daily becoming more significant and obvious. The accustomed moulds had not had the time even to set before they were discarded. Moreover, Germany had universal suffrage for the Reichstag from 1867: England for Parliament only since 1884 (and even then with immense reservations). In Prussia the three-class system simply forced the differences of interest into the public mind. Lastly, the art of compromise has been learnt and taught for two hundred years in England, and in Germany, at the most since 1867, but hardly properly until 1919, when the parties were admitted to political sovereignty. Indeed, the peculiar régime of Germany and Prussia from 1867 to 1918 forced the parties into a state of irreconciliation, because they were played off the one against the other by successive Imperial Chancellors.

The parties are, in fact, only at the commencement of their career. They have yet to learn the impossibility of perpetual intransigence. But they are showing, even in the midst of their ferocious battle with their opponents on either side and before and behind them, a concern for co-operation to give the State a stable executive. At least political scientists have begun to insist upon *Staatsgesinnung*, that is a 'State mentality', and *integration*.<sup>1</sup> In short, the unifying factors in political life are being stressed, and people are crying out that there ought to be a modification of party egoism that the State may not perish—or, in other words, that *in order that the national community may peacefully live in a single and undisrupted State, its units must practise abnegation*. The German Republic certainly stands or falls upon this commandment.

<sup>1</sup> This is the whole burden of Smend's *Verfassungslehre*; cf. also Koellreutter, *Die Politischen Parteien* (1929), and *Die Reichstagswahlen von 1930 und die Staatslehre* (1930), von Calker, *Sinn und Wesen der politischen Parteien* (2nd Ed.) (1929), Triepel, *Verfassung und politische Parteien* (1930).

Yet obedience to it is extraordinarily difficult. Germany received Roman Law in the sixteenth century because she was easily within the orbit of the Italian Universities ; England was spared this, since she was far away. To-day Germany cannot avoid the disruptive influence of communism, for immediately on her frontiers its greatest practical experiment is being conducted. No government has been able permanently and hermetically to seal a long land frontier against germs, liquor, money or knowledge. Germany must suffer or enjoy the results of her geographical situation. Further, the country has to overcome territorial differences which are coincident with racial, religious, and cultural differences : the fate of the Centre Party illustrates this, and the existence of the national minorities. Finally the existence of a large percentage of Roman Catholics, territorially not far from the Holy See, maintains the defensive-offensive fire of Evangelical and Catholic. They stimulate the atheism and agnosticism of Marxists and are stimulated in turn by them. Then, the contiguity of large centres of Jewry, in Poland, Russia and Galicia, inflames anti-Semitism, and, in order that no loophole shall remain for the Jew, this gives rise to doctrines of racial superiority which exclude all possibility of reconciliation on an equal basis and make of intransigence, ostracism and subjection, at once a necessity and a virtue.<sup>1</sup>

### FRANCE

CARDINAL RETZ : '*Il faut changer souvent d'opinion pour rester dans son parti.*'

For the U.S.A., going back to the Civil War, there is no difficulty at all in making a table of electoral statistics, which shall characterize both justly and clearly the rise and fall of the fortunes of political parties ; there is hardly any difficulty about English conditions for the last three-quarters of a century, although the Irish and the Free Trade problems cause certain obscurities ; there is a little more difficulty in regard to Germany because the parties are many and they were and are fissiparous.

For France there is most difficulty, for party organization, which manages elections, compels the electoral conformity, and controls the parliamentary activity, of members, is existent only in three parties, namely the Radical-Socialists, the Socialists and the Communists, and of these parties the Communists are of recent parliamentary advent, the Socialists have had a chequered history, and the Radical-Socialists do not and cannot enforce discipline, and moreover, began to organize only at the beginning of the twentieth century. From election to election the names of the organizing groups and committees change, from constituency to constituency the labels of the candidates vary

<sup>1</sup> Cf. Kautsky, *Are the Jews a Race?* ; Oppeln-Bronikowski, *Anti-Semitismus*, and Goldstein, *Rasse und Politik*.

though they may be sponsored by the same Parisian headquarters, and later meet in the same group in the Chamber ; from election to election the names and membership of the campaign *blocs* and *cartels*, the *unions*, the *fédérations* and the *alliances* are transformed ; from parliament to parliament the groups of the Chamber freely change their names. No wonder that the official electoral statistics have an ever-varied classification since 1871. Moreover, it is difficult to compare the parties of before 1871 with those after. Not until 1914 was there a regular official grouping, when it came about by a rule of the Chamber of Deputies requiring the inscription of names in groups for the purposes of representation on the Parliamentary Commissions.

As important as any of these factors is the rapid growth and change of French Groups since 1900. At every election, 1902, 1906, 1910, and so on, until 1928, new groups appeared. No one can tell beforehand exactly which groups will co-operate in the Government or the Opposition, and certainly not the terms of co-operation or the occasion of secession ; for though they may run in loose harness for the purpose of defeating an opposition *bloc*, as did the Cartel des Gauches in 1924, the component groups are independent, and proud of their independence.<sup>1</sup> Nor is that all : in every Chamber there are a number of members independent of any regular grouping.<sup>2</sup> The characterization of French parties is therefore difficult, and one is almost compelled to choose between the simple dichotomy of Conservatives and Liberals,<sup>3</sup> and the bewildering task of comparing a dozen programmes and histories whose shades of difference may be the product only of personal animosities or loyalties and one or two differences of principles from among a score. Let us attempt a combination of these methods ; and always remember the phrase of a recent critic : ' the members of Parliament, in their general forgetfulness of principles, have become as subtle as cardinals, and the scribes and teachers of the Talmud.'<sup>4</sup>

By hard labour one can construct a rough table of the fortune of parties since 1871.<sup>5</sup> They pass from Right to Left. If we take, as the latest bloom of this evolution, the electoral results of 1928 after division into groupings in the Chamber of Deputies, we obtain the first

<sup>1</sup> For example, in 1919 there was an electoral arrangement between the Right and Centre Parties, but groups very soon broke away. In 1924 there was an electoral arrangement between the parties of the Left, but the Socialists refused to enter a Government, and were weak supporters.

<sup>2</sup> In the Chamber of 1928 at least fifty, i.e. one-twelfth of the assembly.

<sup>3</sup> This is almost the solution adopted by Siegfried in his *Tableau des partis politiques* which appeared after I had written my account. I doff my hat to this brilliant essay.

<sup>4</sup> Privat, op. cit., p. 173.

<sup>5</sup> I do not reproduce it, but it can be made with risks of minor inaccuracy from Seignobos' volume, *La troisième République*, in Lavisse, ' Histoire de la France Contemporaine,' aided by Lavergne's statistics since 1910 in his series *Les Élections Législatives*.



ground of distinction.<sup>1</sup> The figures are (effectives in the Session of December, 1930) :

<i>Right.</i>						<i>Left.</i>						
Démocrates Populaires.	Union Républicaine démocratique.	Action dém. et sociale.	Républicains de Gauche.	Gauche Sociale et Radicale.	Gauche Radical.	Indep. de Gauche.	Republicains Socialistes.	Radical et Radical Socialistes.	Parti Socialiste Français.	Socialistes.	Communistes.	Independents.
18	85	31	64	17	51	22	15	113	14	107	9	41
No group.												20

If we take these figures (the Independents must be included in the Right), a line could be drawn through *Gauche Radicale*: (1) the groups on its Right will almost always act in co-operation as *socially* and economically conservative; the *Gauche Radicale* itself tends to a policy of co-operation with the Right, but is often split. Left of this group are the socially progressive. Further discrimination is necessary. (2) All on the Right are normally in agreement upon authority and efficiency, but on the Left there is serious difference, for the Socialists look to a situation where there shall be rather strict governmental authority, and the Communists are even more extreme in this respect, yet both would be prepared to overthrow a *bourgeois* government at the present stage of social development which attempted to use the strong hand for capitalistic purposes, except repression of the Catholic Church, while the Socialists, for concessions, would be prepared not to enter a Government, but at least to vote for a coalition<sup>2</sup> of Left Parties, but would abandon these on the first signs of forceful capitalism.

(3) Then the main wings differ as to the parliamentary system: the Extreme Right looks to a dictatorship (monarchist), and always the strengthening of the permanent Executive power, i.e. the President, and hence at present favours the idea of the Separation of Powers to restrain the assemblies and increase the unchallengeable stability of the Executive. Thence, leftwards, through all shades of difference, the Groups become more and more republican, and in fact, if one goes back to the essential controversies of before 1871, groups even as far as the *Républicains de Gauche* must be included in the republican,

<sup>1</sup> From Privat, *op. cit.*

<sup>2</sup> Cf. Herriot, *Pourquoi je suis Radical-Socialiste* (1928), on his attempt in June, 1924, in November, 1925, and in July, 1926, to secure the co-operation of Léon Blum and the Socialists. Co-operation was refused on the grounds that the Socialists could not enter into a Government dominated by another party and that the policy suggested was not sufficiently socialistic. Herriot concludes: 'It is perfectly true that the Socialist group constantly supported me with its votes; that its speakers helped me all over France, with an ardour and loyalty for which I am most grateful. But I have no need to insist too much on the difference which separates the two formulae: to vote for and to govern with.' Cf. pp. 87-90.

anti-monarchist camp. Yet still, on the extreme Left, appear the Socialists and the Communists, some, but not all, of whom at least speak in terms of potential dictatorship. Nor is that all: other elements disturb the simple division into Right and Left. Such are nationalism and internationalism, and Catholicism and Secularism.

(4) From the Extreme Right to the Radical-Socialists there is a strong, at the extreme, a ferocious, nationalism; but in the middle of the Right this is, on the proper occasions,<sup>1</sup> tempered by ultra-montanism; while, at the Radical-Socialists, a rational recognition of the propriety of international peace, and therefore of reciprocal abnegation, begins to operate, and finds its extreme expression in the internationalism of Socialists and Communists. France, like Germany, is bound to have as a permanent rallying cry of the parties of the Right, or as a general permeation of all parties, the question of security. She has long frontiers, she has long memories, she loves her own culture and race, and is placed between other cultures and other races. Even as Englishmen are united regarding sea-power, so are all French groups obliged to temper their liberalism by military reaction against potential military invasion. At any moment the 'national' issue may take seeming and so-called republicans and radicals over into the camp of the Right and help either to support a 'national' *bloc* which is also anti-republican and anti-liberal, or to cause the downfall of a Ministry founded on the Left groups which pursues a liberal policy at home, and alas! abroad also.<sup>2</sup>

(5) Nor are the fires of religious passions extinguished. The machinery and rational spirit of the eighteenth century sapped the foundations of the Catholic Church, the *societas perfecta*, the State by the side of the State, built on self-respect, general acceptance, and privileges established in the concordat centuries old.<sup>3</sup> If liberalism had never come into the world outside the Church, the Church itself in part at least would have become liberal: but since liberalism grew up outside it, it was forced to react as an abnormally conservative institution, and so vindicate tradition and the existing social order more than they deserved, and more perhaps than all the clergy in their heart of hearts believed that they deserved. Liberals, then, were bound to think of the Catholic Church as the enemy of political and social progress; and, indeed, the life of the Church was bound up with the monarchy with whom it had made the *concordata*, and who, by the acceptance of religious ceremonies at the coronation and other State

<sup>1</sup> For example, permission for the return of the Congregations, and the Embassy to the Holy See, in 1929.

<sup>2</sup> Cf. downfall of the Briand ministry in 1922 owing to the fear of weakness before Germany.

<sup>3</sup> Cf. Esmein, *Cours d'histoire de droit public*; above all Debidours, *Histoire des Rapports de l'Église et l'État de 1789 à 1870*, Chap. I.

occasions, gave the Church an adventitious claim to public consideration and authority. The Constituent dispossessed the Church and incorporated it by making the clergy into civil State functionaries paid by the State. But later the Convention and the Directory carried the secularization of the State to its logical conclusion, and separated Church and State completely, partly from rationalism and partly because the Church was opposed to republicanism. Napoleon re-established the régime of the Concordat: the Catholic Church was once more recognized as an independent power, and the clergy were paid out of the public treasury. Thenceforward, the Catholic Church was the established Church of France. It was found always on the side of the monarchy and the monarchists; it was the permanent opponent of social and political liberalism. The republican parties and sects regarded it a double enemy: an obstacle to the lay State in its doctrines and organization, a foe, that is, of the State which alone has authority and comprehends equally all citizens without intervening associations, and permits to *all faiths* equal freedom and privileges; and, secondly, a powerful political obstacle to their programmes of reform, with sanctions more compelling and less reasonable than those at the disposal of rationalists.<sup>1</sup> When Gambetta surveyed the causes of republican failures at elections, he saw that the *curé* in the villages had the power to nullify republican efforts: hence the cry '*Le cléricisme, voilà l'ennemi!*' The republican form of government was itself outlawed by the Catholics, until the *ralliement* of 1892 when Pope Leo XIII declared in his Encyclical that to accept the powers that were was not only permissible but necessary. To separate State and Church became, however, one of the urgent portions of the policy of the republican groups; i.e. to abolish the Concordat, to make the Church, equal with other churches, a self-governing association, without official connexion with the Government. The Dreyfus affair, in which the Church and Catholic Generals were the ferocious supporters of the army and hostile to revision and plain justice, added zest to the pursuit of this object.<sup>2</sup>

Moreover, *Congregations*, which had been expelled by the Revolution, had established themselves again, and the monks had been particularly the enemies of the impious republican State; and both these and the regular clergy intervened in elections. Under Waldeck-Rousseau a '*bloc républicain*' of all the Left groups, including the Socialists, was founded in 1899 to defend the republic against the nationalists, militarists and their Catholic supporters. Waldeck-Rousseau, himself a moderate Liberal, created this *bloc* for a defensive purpose, but could only maintain it by conceding social reforms to the more progressive groups. His ministry proceeded further to make

<sup>1</sup> Cf. Weill, *Histoire du parti républicain en France*, 1814-70.

<sup>2</sup> Cf. Reinach, *Histoire de l'Affaire Dreyfus*.

the Law on Associations of 1901, which required previous authorization for the establishment of *Congregations*. The radical Left pressed more extreme amendments, and the *Congregations* were subjected to supervision.<sup>1</sup>

The contest was continued by the *bloc* under Emile Combes, which issued from the elections of 1902 somewhat radicalized. Relations between the Government and the Holy See became exceedingly strained. The Socialists were, however, in 1904 detached by the non-co-operation decision of the Amsterdam International Socialist Congress. The anti-Church policy was too severe for moderate republicans and little by little they moved into opposition. Combes' Ministry fell in January, 1905. The Law on the 'Separation of Church and State' was passed some months later. The elections of 1906 were fought on the question of the *execution* of the law, and the groups fell into two *blocs*, the republican groups of radical tendency winning a remarkable victory. The *radical bloc* supported Clemenceau for nearly three years, while the law was executed, and then fell a victim to various disorders, postal strikes, and internecine strife with the extreme radicals and socialists. Church and State were separated. The memory of the battle still survives and its wounds still smart, and the strength of the Church, now separated, is little diminished, for short of complete suppression, its political influence must always operate, especially in the rural districts—and France is still more rural than urban. The State is secular, but society is religious, and its religion is Catholic: clerical influence prevails, therefore politics are not secularized. The parties of the Left are exceedingly sensitive to any movement, be it in education or otherwise, which may reintroduce the official influence of the Church.<sup>2</sup> Where that influence, which is a socially and economically conservative one, is desired, the Church will be favoured by the parties—e.g. in the question of votes for women, who are considered to be peculiarly liable to clerical influence, or to stop egalitarian reforms. A numerous peasantry makes this possible, and the tendency is in favour, always, of conservatism.

A glance at the electoral statistics since 1871 shows the movement of power steadily away from the Right to the Left, and, since the War, even towards the Socialists. The latter development does not make the parliamentary relations of the Left groups easy, for if Socialists support a successful Left Government based on the Radical Socialist Group, they are giving away electoral strength to their opponents; while electoral strife between them is not conducive to friendly parliamentary

<sup>1</sup> Debidours, *l'Église Catholique et l'État*, 1870–1906, II, 288 ff.

<sup>2</sup> In 1929 and 1930 the Left upset the Tardieu and the Chautemps Cabinets on the religious issue; an attempt had been made to include M. Pernot as Minister of Public Works in that Cabinet—he was professor of law at a Catholic university. Cf. Siegfried, *op. cit.*, p. 151.

co-operation.<sup>1</sup> But there are always middle parties, moderates, who swing now to the Right now to the Left in the Chamber and the Senate, making possible first one ministry, then destroying it, and then supporting another, but never prepared to make a permanent and binding coalition with either side.

Some other considerations are of importance before we review the existing parties. (a) France is very largely agricultural and rural. Thus 54 per cent. of its population (Census of 1921) is rural; and 5 million of its 8½ million employed in agriculture are peasant proprietors. Hence there is a permanent mass of electors who are not interested in great social reforms, but who are interested in stability, personal freedom and security. They are individualist and republican, but not radical, hardly liberal; and in certain localities, shut off from the general influence of towns, like the Alps, the Pyrénées, the Vendée, Sèvres and Mayenne, are under the domination of the clergy. (b) The growth of republicanism, socialism and communism is in large part the result of urbanization since 1848. In that year 76 per cent. of the people lived in communes of less than 2,000 inhabitants; now the territorial centres of influence of the Left are found in the great towns and the radical Midi. The growth of industry, finance and commerce has equally caused the growth of defensive-offensive associations of the economic ruling classes, and these support the parties of the Right with funds and propaganda. (c) The record of seats obtained by the parties is not an exact record of votes obtained, that is, strength in the country, because the method of election alternated between the *single-member* and the *general ticket* system from 1848 to 1919, while in 1919 and 1924 an imperfect system of proportional representation was substituted, and then, in 1925, a return was made to the single-member system.<sup>2</sup> Moreover, the method of the second ballot has caused the formation of election *blocs*, based upon general and vague propositions of co-operation; but the *blocs* have been rather negative and combative, than promises of positive ministerial co-operation. (d) The tradition of the great Revolution and the minor ones of the nineteenth century, especially the principle of equality, conduces to an extraordinary passionateness in the consciousness of political differences. Intellectual differences are sharpened by this. But to this cause we must add another, which is well-analysed by

<sup>1</sup> Cf. Privat, op. cit., p. 42: 'There are two sorts of radicals: those who are elected against socialists, and those who are elected by their aid. These two tendencies are at odds with each other. . . . From hatred of the anti-clericals the reactionaries have very often favoured the "revolutionary" candidate. . . . On the other hand the socialists are afraid of being devoured by the communists.'

<sup>2</sup> The resultant misrepresentation is capably exposed in the studies by Georges Lachappelle, *Les Elections Législatives*, 1914, 1919, 1924, 1928. Cf. also Chap. XXI, *the Defects of Representation*, *infra*.

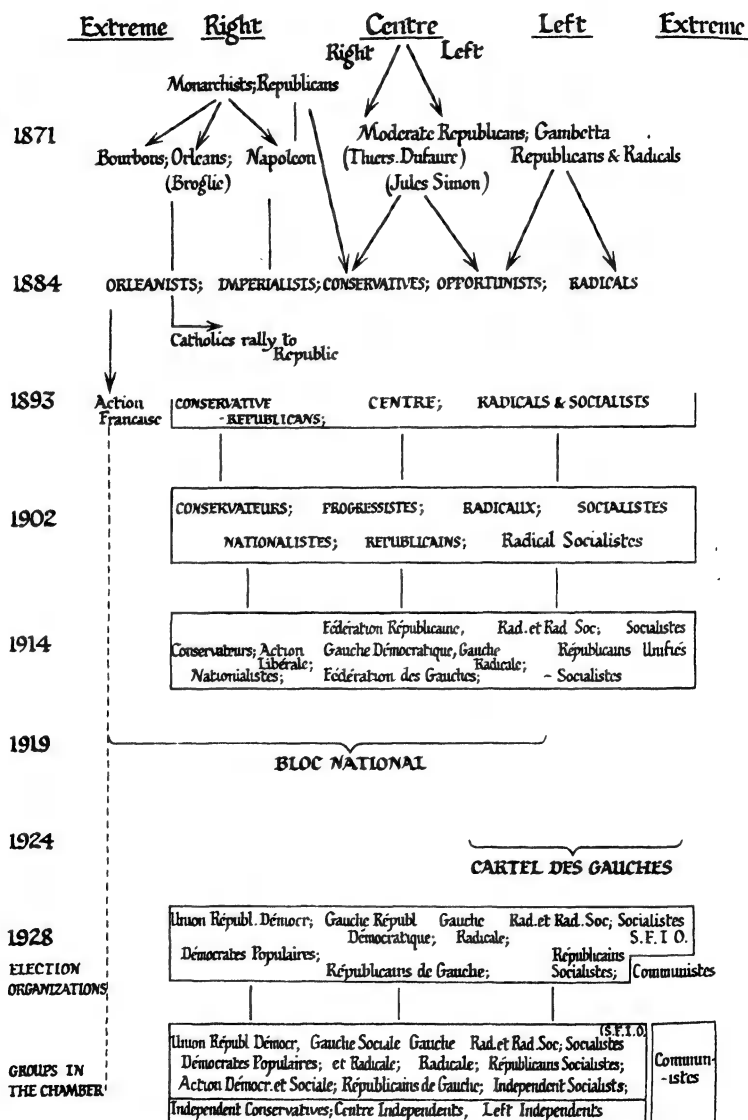
Lachappelle, *Les Elections Législatives en 1928*, p. x, says of this classification 'in grouping the principal parties under the fewest possible classifications. . . .'

Madariaga, that is, a general pride in intellectuality and its logical outcome in terms of rhetoric, controversy and action. This makes French parties and groups extraordinarily fissiparous. Further, the vicissitudes of restorations and dictatorships have emphasized the native individualism of the country and have produced a permanent anti-administration mentality. Hence the various groups seek administrative control rather than legislative reforms: large industry wants to be let alone, the peasantry wants to be let alone, and the Left are afraid of bureaucracy. Hence, too, the constituencies—the sovereign electorate—dominate the mind of the deputy: there is no party discipline worth speaking of except in the Socialist and Communist parties, and there are rapid and unforeseeable changes of party and group organizations, under the influence of well-expressed novel doctrines.

Let us take the election result of 1928, and analyse the parties and the corresponding groups with which they are concerned. I have attempted a genealogical table (p. 608) of Parties and Groups leading down to that date. It neither is nor can be perfectly exact—for the names of the parties have too frequently changed, personal dissension is too frequent, and loyalty to leaders too slight, organization and discipline too rudimentary for consistency.

The Dreyfus affair gave rise in 1898, on the Right, to a group, called the *Comité d'Action Française*, at first nationalist, anti-Dreyfus, anti-Semitic, but neither clerical nor monarchist. Under the impulse of Charles Maurras the Group became royalist, their candidate being François Philippe, Duke of Orleans, and they have also become saturated with the spirit of Catholic hierarchy and authority.<sup>1</sup> Their sense of national unity and authority is extreme: there is no higher authority than the State and the reason of State, neither within the national Society nor outside it. The success of Bismarck's falsification of the Ems telegram *deserves* praise. The public welfare is the supreme test of the moral worth of a government or a principle of politics. (But, *who are the public? and what is their welfare? are two vital but unanswered questions.*) Still, the *Action Française* thinks it is possible to read answers off from careful and *real* observation of the nature of man. (The extremist, of both wings, naturally inclines to the use of the word *real*: he is so *certain* of himself, so passionate, that that which to others is an object of dubiety and proper circumspection is to him an object of reality, and more, of compelling reality.) They believe, for example, that individualism, democracy, parliamentarism, bureaucracy, produced by the Revolution, are contrary to the nature of *Frenchmen*, especially where these have given opportunities of government and social prestige to Jews, Protestants, Masons and Métèques. What, then, does accord with the nature of

<sup>1</sup> Cf. De Roux, *Charles Maurras et le nationalisme de l'Action Française*; Mermeix, *Le Ralliement et l'Action Française*.



France? A monarchy advised by self-chosen ministers, supplied with money by representatives of provincial assemblies, and permanently counselled by advisory bodies in which the vocational associations are represented. 'Many counsellors, but only one master!' The family will have restored to it free testamentary disposition, no longer will it be compelled to divide its goods as the Revolution had determined. There will be complete local self-government, and this in great regions, and the provincial assemblies will re-awaken the body of the nation, hitherto bound in artificial bonds. Professional, religious and moral associations will obtain a large sphere of liberty. The method is revolutionary. Why? The majority of the French are not royalist. 'We are a conspiracy!' 'Will, decision, enterprise issue from small numbers; assent and acceptance from the majority. Virtue, audacity, power and suaveness belong to minorities.'<sup>1</sup>

The connexion between the *Action Française* and the Catholic Church is queer. The chief contributor, Charles Maurras, is a declared atheist, yet his doctrines of hierarchy and duty have been acclaimed as Catholic; moreover, he accords that Church a pre-eminence in the State because he approves of its qualities. The Catholics are divided in their attitude to the *Action Française*: some are its supporters, a few are critical, since they regard its essential atheism as inwardly hostile and ultimately destructive. This current of Catholic hostility had a scalding effect in 1926. Some young Catholics inquired of the Archbishop of Bordeaux whether they ought to follow the doctrines of the *Action Française*. The answer was uncompromisingly in the negative. All the leaders except Maurras answered that their Catholic following had found themselves spontaneously in accord with the doctrines of Pius XI. The Pope was invoked and maintained the Archbishop's pronouncement. The *Action Française* (newspaper) was put on the Index, and later the clergy were forbidden to give the sacrament or absolution to readers of the paper, and injunctions to this effect were issued. But this has been taken as a political, not a spontaneous religious movement, and many members refused submission. Narrow, indeed, is the way of the Church in politics!

It must be admitted that the economic doctrines are obscure and contradictory. The main questions are (a) the distribution of the product of industry between employers and employed, (b) the form and organization for the control and management of enterprise, and (c) the relationship between the State and industry. Until the War the only answer given was the insistence upon private property, freedom from State control and development of producers' syndicates. Since the War a corporate syndicalism, not, perhaps, far different

<sup>1</sup> Cf. Maurras, *Enquête sur la Monarchie*, p. 139.



from the corporate state of Fascism, has been suggested; with an economic council at the summit for reconciliation of potential conflicts of interests. Nothing more precise is discoverable. The party was too irreconcilable and revolutionary to participate in parliamentary elections, until 1919, when it changed its tactics, and some of its members appeared on conservative lists, while in the Department of the Seine it established its own list, Léon Daudet being elected. Conformably with the avowed neutrality of the party the candidates did not stand as royalists but as 'republican patriots'. Antagonistic to Germany, to the League of Nations, it has supported only the chauvinist Foreign Ministers. Léon Daudet was not re-elected in 1924; in 1928 this party had no members in the assembly.

2. The next Parties on the Right are :

- (a) *Démocrates Populaires*,
- (b) *Union Républicaine Démocratique*,
- (c) *Action Démocratique et sociale*.

(a) The *Démocrates Populaires* established a grouping in November, 1924. It was able to collect about fourteen members in that legislature. They claim to be democratic both politically and industrially, to accept the Republic as the dispensation of heaven, they support liberty of conscience, education, liberty of press and meeting, they promise to educate the civic sense and respect religious convictions. They are at once nationalist and supporters of international co-operation and the League of Nations. They appear to me to be socially generous, and match the English Liberal Party and the German Democratic Party. They themselves declare that if the Chamber were divided into two, Right and Left, they could well be found upon its extreme left. Yet French students place them on the Right. Another party, *La Jeune République* (founded in 1912), is a Christian-Catholic-Democratic organization, and could be found just on the left of the *Démocrates Populaires*, but it differs from these in its Catholic tinge, and therefore, its potential attitude on the religious question.

(b) The *Union Républicaine Démocratique* is the Chamber group of the Party called the *Fédération Républicaine*. This was established in 1903 by a fusion of three organizations,<sup>1</sup> with the informative motto of *Order and Progress*, and the maxim 'Liberty, Equality and Fraternity', and the policy of maintaining the principles formulated in the Declaration of the Rights of Man. It was anti-radical: it has become strictly conservative, in the modern sense, i.e. domestic individualism and international egoism. One of its past presidents was Charles Benoist, the present president is Louis Marin.

In 1920 the Party received reinforcements in Lorraine. It insists with remarkable obstinacy upon individual independence and guar-

<sup>1</sup> *Union Libérale Républicaine*, (*Groupe des Progressistes* (Senator and Prime Minister Meline) and the *Association Nationale Républicaine*.

antees for individual rights. Benoist's works emphasize the importance of the Separation of Powers and judicial review of the constitutionality of laws in order to prevent Parliament from interfering by statutes with individual and corporate property and conscience, and the present programme includes this. It is hostile to religious persecution. It ascribes the nation's financial troubles to State socialistic activity, and says that there is no well-being unless the notions of retrenchment and respect for the family control society. Taxation ought not to be an engine of civil war. Nor must the guilt of Germany be forgotten—the only efficacious policy is that of 'guarantees'. No truck with socialism; freedom of testamentary disposition; abolition of estate duties! Citizens must obtain easy methods of defence against State services. A great deal is to be done in the way of parliamentary and administrative reform—the numbers of parliament are to be halved, professional associations are to collaborate constantly with Parliament and the *Conseil d'État*, the right to speak and propose amendments to the budget are to be curtailed; in administrative reform, it demands regroupment and distribution of services, less hierarchical control, decentralization, and a thorough reorganization of the Cabinet. This party is a strong supporter of the Catholic Church: it supports the Catholics of Alsace-Lorraine, the embassy to the Vatican, the abrogation of the Law of Association of 1901 against religious congregations, the admission thereof to the benefits of the Law of Association of 1884, permission to such congregations to receive subscriptions and legacies, grants in aid to private schools (with State inspection) and the admission of the Holy See to the League of Nations.

This is the party of big industry and finance; it is harsher than the well-turned phrases of its philosophers suggest; and seems to be equivalent to the extreme English Tories; and, though it insists upon its republicanism, its spirit of social exclusiveness links it loosely with the lost cause of monarchy. The party is a composition of new growths and revulsion from radical and socialist tendencies of its former republican colleagues. Among its leading members are Yves Guyot (died 1929), Arago, the Wendels, and François-Marsal, whom President Millerand, in 1924, entrusted with a ministry in defiance of the constitutional objections of the Chamber of Deputies.

This party was a strong supporter of the *bloc national* formed in 1919 as an electoral organization of the Right against the 'menace' of Bolshevism and to see that the Peace as well as the War was victorious for France. Both Millerand as President of the Republic and Poincaré as Prime Minister received its steady friendship; and, in 1931, it preferred Doumer to Briand as President of the Republic.

(c) A little on the left of the *Fédération Républicaine* is the *Parti Républicain démocratique et social*, reorganized in 1920, but going back to a group of Left republicans of opportunist tactics, and claiming personal links with Gambetta, Jules Ferry and Sadi Carnot and Waldeck-Rousseau. Such claims are made by other groups, also—and in fact may truly be made, for all the republicans and left groups of the present day have at least the element of anti-monarchism in them. It is peculiarly the party of Poincaré and Senator Jonnart. By profession, at least, it is marked off from its friends on the Right by its secularism, and from the Left by its economic tenets, its irreconcilability with the Socialists, and its affiliations with the commercial, industrial and agricultural defensive associations of the capitalist system. Thus, it corresponds roughly to the Left of 1871–1900, but to-day must be described as Centre Right. It is the left wing of the *bloc national*, and in fact was its instigator; and falls into three groups in the Chamber of Deputies—the *gauche démocratique*, the *gauche indépendante*, and the *républicains de gauche*. But several co-operate with the *groupe radical et radical socialiste*! Such a division into groups is, in fact, not deprecated by the party. It makes easy the detachment of members from implicated groups. The Senators of the Party belong, in the Senate, to the *union républicaine* and the *gauche démocratique*. Active in the party councils are Barthou, Chéron and Doumer. It is favourable to resumption of relations with the Vatican.

(d) By the side of this party, formed by those who were expelled from the *Parti Radical et Radical Socialiste* in 1924 for voting with the *bloc national*, is the *Gauche Radical*. It is opportunist, swaying now Right now Left, and can be described as Centre Left. But a group of some fifty votes which sway here and there in a Chamber in which there are so many groups is very important, and dangerous to the stability of government.<sup>1</sup>

Squarely in the Liberal ranks is the *Parti Radical et Radical Socialiste*.<sup>2</sup> It is impiously anti-clerical, supports the policy of uniform and secular public education and generous scholarship schemes, is genuinely concerned to secure international peace, and unites a theory of private property with State activity for the benefit of the poor and helpless. It insists at once upon freedom and efficient administrative organization. Its theorists and leaders have been Jules Simon, Gambetta, Clemenceau and Camille Pelletan,<sup>3</sup> Bouisson and Edouard Herriot.

<sup>1</sup> Cf. Privat, op. cit., p. 266: 'The *gauche radicale*, where indiscipline is the law, was astonished that its president, M. Daniélou, otherwise a charming and a subtle strategist, did not convoke it to ask authorization to take a portfolio.'

<sup>2</sup> Cf. the outline of its history and organization in Maurice, *Le Parti Radical* (1929); for an earlier period, Charpentier, *Le parti radical et radical-socialiste à travers ses congrès*. Cf. also Marcellin, *Voyage autour de la Chambre de Mai*, 1924.

<sup>3</sup> There is a short biography of him by Tony Révillon, 1930.

Strong enough to urge, if not entirely to dominate, policy, since 1898, it added to the statute book, in successive years, the law on associations (1901), reduction of military service (1905), separation of Church and State (1905), workers' pensions (1910), and income tax (1917). The spirit of the party is to-day well-characterized by Herriot, who, in a recent volume,<sup>1</sup> indicates the sources of modern policy: the scientific attitude, unwillingness to be bound by non-evolving formulæ, the hatred of oppression, which was especially awakened by the Dreyfus case, social helpfulness of the State without bureaucratic routinization. Herriot's own words explain the party's difference from its Socialist neighbours on the Extreme Left. 'Is it possible to give to man his power of development, that which remains, according to us, the essential task of politics, if you refuse to him, in any object, and in particular in that which he has created, that right of property which, after all, given the brevity of life, can never be other than a right of use?' And yet, 'radical socialists admit and proclaim the necessity of collective property for the profit of the communes or the State, co-operative societies or trade unions.'<sup>2</sup>

Between this Party and the Socialists, is the *Parti Républicain Socialiste*,<sup>3</sup> more usually with the Radicals than the Socialists. However not all the members of the Republican Socialist group in the chamber belong to the electoral organization. Some of them have voted with the *bloc national*. The principal leader is Painlevé, who seeks a permanent alliance between all the Left groups excepting the Communists.

We arrive at the Socialist and Communist Parties. In the Chamber of 1928 there were 100 Socialists belonging to the *Parti Socialiste, Section française de l'Internationale ouvrière*.<sup>4</sup> Neither the group nor the party comprises all the Socialist representation, for the group has certain affinities with some Radicals and some Republican Socialists. Moreover, there are socialist organizations and constituencies independent of the main body. The present situation is the result of a long evolution of doctrine and organization, the year 1905 constituting a focal point. In that year the various lines of evolution joined in a single organization: the indigenous tendencies of class-conscious

<sup>1</sup> *Pourquoi je suis radicale socialiste*, 1928.

<sup>2</sup> *Ibid.*, pp. 54-5. Cf. also p. 61: 'I therefore maintain the programme which, while realizing to the maximum possible equality and justice, will give to mankind, in all its aspects, its maximum of power, of creative force and liberty, instead of posing absolute formulæ only to empty them, in the result, of a part of their contents. I avoid every dogma. I shall pronounce myself, for example, in favour of nationalization of railways, realized without a spirit of bureaucracy, by the constitution of an organism composed of railway users, the personnel, the representatives of general interests and those of the State.'

<sup>3</sup> Its name as a public organization is the *Fédération nationale du parti républicain socialiste*.

<sup>4</sup> Hence the usual abbreviation: S.F.I.O.

decentralization and self-aid in co-operative societies and producer's syndicates of Proudhon,<sup>1</sup> the revolutionary communism of Blanqui (drawing inspiration from Babeuf of the Great Revolution),<sup>2</sup> the parliamentary State socialism of Louis Blanc,<sup>3</sup> and the foreign but preponderant force of Marxism, through Jules Guesde and Paul Lafargue.<sup>4</sup> These tendencies had till then divided and wasted socialist efforts in a series of bitter animosities. The 'reformism' of Louis Blanc found its champion and developer in Jean Jaurès.<sup>5</sup> The new party, called the *Parti socialiste unifié*, accepted the basis of the revolutionary class-war, with the ultimate aim of a 'collectivist society', but of immediate reforms, and of non-co-operation with other groups in Parliament.<sup>6</sup> Its electoral doctrines were not always so intransigent, its tactics often admitted transient alliances with bourgeois groups, its party discipline was severe. As in all other countries, so in France, the War disrupted the Socialists, and the Bolshevik Revolution set a seal upon the disruption. In 1920 at the National Congress of Tours a minority of the party formed the S.F.I.O., with a doctrine and tactics similar to the British Labour Party and the German Social Democratic Party, the rest joined the Third (Moscow) International and formed the Communist Party (S.F.I.C. or *Section française de l'Internationale Communiste*). Since then other scissions have occurred: in 1923 the *Union Socialiste-Communiste*, a small group, standing between the S.F.I.O. and the Communists, and moving towards the former. There is also a small group of socialists on the Right of the S.F.I.O. The leaders of the S.F.I.O. have acquired a European reputation: Léon Blum, Renaudel, Paul-Boncour, Longuet; so also of the Communist Party, Marcel Cachin and Rappaport. The former has a territorial organization, the latter organizes on the basis of factories and workshops, and is more centralized and exclusive. In 1924 the S.F.I.O. made an electoral pact, the *Cartel des Gauches*, with the Radical-Socialists against the electoral arrangements of the Right; the Communist Party, although urged by Moscow to make a 'united front' with other Socialists against the Right, could not reach a complete agreement with the *bloc*. Broadly, the Socialist Party is supported by the reformist trade unions grouped in the *Confédération Générale du Travail*, the Communist Party by the *Confédération Générale du Travail Unitaire*, formed in 1922, affiliated to the Red Trade Union Internationale.

<sup>1</sup> Cf. Introduction to the new edition of Proudhon's works (published Rivière, Paris, 1930), I.

<sup>2</sup> Cf. Vol. VI, *Histoire des partis politiques socialistes en France, Les Blanquistes*, by Da Costa.

<sup>3</sup> Cf. Paul Louis, *Histoire du Socialisme en France*, Chaps. 5 and 6 (1925).

<sup>4</sup> Cf. Zevaés, *Les Guesdistes*.

<sup>5</sup> Cf. Rappaport, *Jean Jaurès*.

<sup>6</sup> Cf. Zevaés, *Le Parti socialiste de 1904 à 1923*; and for the most recent history, the various party manuals.

Throughout the Socialist movement in France, however, whether the moderate or communist, there still vibrate a spirit and doctrines peculiar to the French, while other countries only reflect the original fire—syndicalism.<sup>1</sup> Syndicalism swept France like a hurricane from about 1900. It had many constituent elements; its energy came from belief in the class-war and the righteousness of violence based upon the experience that the propertied classes used Parliamentary institutions to maintain their despotism over the workers and to obscure the real intentions of their rule; materialism was allied with a sense of corporate loyalty in placing faith, not in the centralized democratic State, but in the self-government of the trade unions or the producers' organizations. Through these, *directly*, owning their capital, and organizing themselves, a new world would come into being—the socialized world in which each worker would have a dynamic creative opportunity, and not a static job under the orders of a capitalistic middleman. The parliamentary leaders had betrayed the workers, elections were campaigns of fraud, the bureaucracy stultified the *élan vital* of the generative forces of labour. What then? The producers' associations must prepare the way for their emancipation by maintaining the class-war continuously by sabotage and the general strike: the details of the future did not matter, (all prophecies of dynamic value were largely myths) but, broadly, there would be a society in which ownership and management were decentralized into great industrial corporations. This spirit is still with the French socialist thinkers more than it is with those of other countries.

The various groups and parties are supported by ancillary organizations, intellectual, propagandist, the representative bodies of economic interests. They provide money, speakers, tracts, placards for candidates of whom they approve, and furnish reports on economic and social problems. But the candidates or groups they support have no obligation towards them, and they are not the responsible organizations. In the following table we group them, as near as can be, under the groups they support, but may add that in the programmes and declarations of these groups there is not seldom an unveiled contempt for groups and parliaments. The ordinary deputy is to them a being to be despised for his ignorance, shiftiness and inability to create a 'sound' public opinion. 'Above *all* parties!' they say.

<sup>1</sup> Cf. Humbert, *Le Mouvement Syndical*; Challaye, *Le Mouvement Syndical*; Guy-Grand, *Le Procès de la Démocratie*; *La Philosophie Syndicaliste*, and *Le Conflit des Idées*; cf. the works of Georges Sorel, and such a typical expression as Mer, *Syndicalisme des Fonctionnaires*, 1930.

R	Centre	L
Chamber of Deputies		
<p><i>Union Civiques</i> (extremely anti-Socialist, anti-Trade Union).</p> <p><i>Ligue des Patriotes</i> <sup>2</sup> "La France, quand même!"</p> <p><i>Ligue Française</i> (mainly Right on foreign policy).</p> <p><i>L'Action Française</i>.</p> <p>All interested in stability of the executive, and local government reform, proportional representation, improvement of parliamentary procedure.</p>	<p><i>Ligue Civique</i> (patriotic and anti-Socialist)</p> <p><i>Rénovation démocratique</i> (general constitutional reforms—rather anti-parliamentary).</p> <p><i>Quatrième République</i> <sup>1</sup> (very similar).</p> <p><i>Ligue Républicaine Nationale</i> (Millerand).</p> <p><i>Comité Républicain du Commerce, de l'Industrie et de l'Agriculture</i> (loosely connected with the Radicals but more fully involved with the Right).</p>	<p>Prepared to go a fair distance in social reforms. All anti-alcohol.</p> <p><i>Ligue des Droits de l'Homme</i> (not socialist, but defending the "Reign of Law").</p> <p><i>Ligue de la République</i> (organizer of the Cartel des Gauches) except Socialists.</p> <p>Communists.</p>

<sup>1</sup> Joseph Barthélemy was a member of it.

<sup>2</sup> Maurice Barrès was of late years its president.

Two other subjects deserve some attention: the *blocs* founded since 1919, and the nature of group organization in general. The first is treated, more appropriately, in the chapter on the French Cabinet System. The second, the nature of group organization, can be analysed here. The groups are the parliamentary form of the party. They do not include all the members of the electoral organizations: some of these, while being members of the party for electoral purposes, run upon programmes of their own, with names fabricated by themselves and their local committees.

R

Centre

L

1. *Comité de liaison des grandes associations* (a grouping of various industrial and commercial associations in the interests of employers and of French prosperity).
2. *Union des Intérêts Économiques* (home commerce, light industries, and agriculture; whereas the first is expansionist, this is more defensive: <sup>1</sup> it is defensive against taxation, inquisitions for taxation, public control of industry, and against the State monopolies).
3. Many other employers' organizations and unions of small industries and commerce, often hostile to (1) and (2).

*Confédération Générale du Travail* (Reformist Trade Union).

*Confédération Générale du Travail Unitaire* (revolutionary Trade Unions).

*Syndicats Chrétiens. Fédération des Co-opératives de Consommation* (officially neutral).

Nor do the nearest related groups include only members who were connected by policy and tactics during the election. A group may be newly formed out of units provided by the election, by a concentration of secessionists, or well-known groups may receive the accession of 'floating' members. When a Cabinet is to be formed the leaders of the groups sometimes accept portfolios only after formal engagements as to policy and after consultation, and a majority vote of

<sup>1</sup> Some members of all *Groups*, except the Socialists and Communists, have signified their acceptance of its programme!



the group;<sup>1</sup> sometimes they enter into Cabinets which are far removed from their own group.<sup>2</sup> Whatever they do, they do not and cannot bind their group to consistent support.<sup>3</sup> Some of the well-known Parliamentary leaders belong to no group at all, and are only defined by their general personal character and history,<sup>4</sup> and others, like Poincaré, are above all groups, and move Right or Left as the occasion demands.<sup>5</sup> In 1922 Tardieu refused to enter the Poincaré Cabinet; in 1924 he was unseated partly through Poincaré's efforts; in 1926 he entered the Poincaré Cabinet. This situation is only occasionally deplored, and then mainly by academic writers: it is customary that leaders shall not be followed, and that the following shall be deserted by the leaders, and even when the policy pleases the man may be hated, like André Tardieu by the radical socialists. An extraordinary state of jealousy and destructiveness is therefore generated, which leads to further secessions and new groups and undermines ministries. The sense that the individual constituency is sovereign and that the Deputy partakes of this sovereignty is still extraordinarily strong: and permanently saps the tendency towards organization.<sup>6</sup> Further, 'in France where political situations were always unstable, the lowliest may one day command his former

<sup>1</sup> Thus M. Daladier, a leader of the *Radical-Socialistes*, was not supported in his attempt to form a Cabinet in 1928. He failed because the Socialists refused to co-operate. Yet he was prepared to accept the portfolio of the Interior in a ministry composed of more conservative politicians.

<sup>2</sup> Privat, op. cit., p. 103. The classic case of M. Dubief, sent by the Radicals to M. Rouvier who was forming a ministry, to declare their non-co-operation. 'A portfolio softened them.' Two other messengers were sent; both were charmed by the same means.

<sup>3</sup> In November, 1928, eleven members of the *Gauche Radicale* were induced to help the Right to upset the Briand Cabinet because its foreign policy seemed to be weakening against Germany. Cf. also the division list published in *Le Temps*, 20 December 1930, on the vote of confidence in the Steeg Cabinet. Here the *Gauche Radicale* divided into 24 in favour and 18 against, 8 abstained, and 1 absent. Of 22 Independents of the Left 13 voted in favour and 6 against. As many as 49 other 'independents' voted *against*.

<sup>4</sup> Thus Tardieu and Pierre Laval.

<sup>5</sup> Cf. his entry into the Herriot Cabinet of July, 1926. These two men were on opposite sides in the election of 1924.

<sup>6</sup> Cf. Jacques, *Les Partis Politiques*, 35; Privat, op. cit., 53: 'The Republic knows men and not groups. The life of the country cannot be subordinated to the decisions of irresponsible people. The electors are not divided into those of the first and the second zones. They do not appoint their pretended high courts. They have sent representatives to the Chamber and not to committees. The latter have no mandate.' Siegfried, *Tableau des partis politiques*, p. 209 ff.: 'Because the people wishes to be everything, or at least to affirm its sovereignty, the elected, his delegate, becomes the keystone of the whole system: therefore the supremacy of the deputy, the creation of universal suffrage . . . one must consider the deputy as the central figure of the régime. His true strength is, that, alone in the Republic, he holds a direct delegation of sovereignty. Now, with the single-member constituency, the true French electoral method, the member owes nothing at all to his party, which has not made him and cannot unmake him. . . . Thus, the system reposes on a local basis, upon a polyarchy of constituencies, where the deputy does not receive all his significance unless he himself is a local man, the plenipotentiary of the constituency at Paris.'

chief. It is better not to disdain any one because suddenly a name will issue from the lottery of life. Members of parliament treat each other in a spirit of equality because they are penetrated by this truth.' <sup>1</sup>

It has been argued very cogently and brilliantly by a recent and renowned critic that the politics of 'interests', by which is mainly meant economic interests, does not pay in France, since people are more concerned with persons and the general principles of the social order. This, according to Siegfried, is partly a racial product and partly the result of France's economic condition. Hence the parties do not organize on opposed interests, but as general spiritual tendencies. This does, in fact, mark off France strongly from Germany and the U.S.A. Yet it is undeniable that the economic element enters here very strongly also : it gives the groups territorial strongholds, divides capital and labour, secures monetary and propagandist support ; it has been shown in battles over taxation, protection, and even the apparent freedom from economic obsession is a product of economic satiation. Yet no one can regard French civilization at all closely without realizing that the French are less interested in economic welfare than in other things : intellectual veracity and logic, rhetoric whether in the theatre or the forum, the sensational in the same places, family life of extraordinary solidarity, discipline and tenderness. They do not wish for general rules imposable by a collective authority. Hence the groups need not organize or discipline themselves : they need deliver little more than passionate speeches in defence of liberty or of French unity and security. Since that is so their doctrines are not registered and given a rigid and permanent value ; hence it is so difficult to draw lines of demarcation between the groups which stand close to each other, that even the closest professional students of French political life contradict themselves on different pages of their works.

One other point of importance. There is some resemblance and connexion between the Groups of the Chamber and the Groups of the Senate, but no unifying and organic association between them. There is a Socialist Group which is the true senatorial wing of the Socialist Party ; there is a Conservative Group (of the Right) composed almost entirely of aristocrats ; the intermediate groups are weakly affiliated to those of the Chamber : the largest (146 members in 1927) is the *Groupe de la Gauche Démocratique, Radicale et Radical Socialiste*, which corresponds to the Radical and Radical Socialist Group in the Chamber, but with a bias towards the Centre rather than the Left ; the *Gauche Républicaine* (22) corresponds to the moderate Conservatives of the *Alliance Démocratique* electoral organization and group in the Chamber ; the other two groups, Union

<sup>1</sup> Privat, 76.

Démocratique et Radicale (30) and Union Républicaine (84), are very definitely on the Right. There are occasional personal connexions with the electoral parties and Chamber groups, rather than wholesale and permanent identity. This is due to the independent status of the Senate and its method of election (which we explain in a later chapter) as well as to the generally weak organization of parties in France. This has important effects, for party organization can go far to mitigate the constitutional independence of a second Chamber; in France it does this only in the smallest degree.

### CONCLUDING CONSIDERATIONS

Thus parties are the power behind the throne. Whatever the form of the state, parties govern by directing the energy which moves the machinery; and their peculiar power is that in their absence the fires would run too low for activity, or the wheels would obstruct each other instead of working smoothly in their appointed positions and functions. About twenty years ago an American statesman<sup>1</sup> referred to parties as the 'invisible government', and contrasted the institutions and activities expressly permitted by the constitution with the real sources of power. Such a contrast was, and still is, much more emphatic in the U.S.A. than it is in Europe. Since the time when the term was invented, party government has, as it were, legitimized itself. It has not entirely come into the open; not all its members, its plans and thoughts, are public. Nor can they be, any more than in any other institution of human society. But that is a product of the civilization in which such institutions function. The things which are taboo, but necessary, do not die: they live a hidden, though perfectly effective, existence, just as the repressed libido of the individual either hides in the unconscious, or is converted into seemingly inexplicable qualities of behaviour, which is only a form of hiding. Every human motive has an ugly aspect until it has been dressed in the mantle of philanthropy; open the door of the dressing-room and the illusion is destroyed. Party has ceased to be the invisible government, and has become not only the visible, but the acknowledged, government in democracies. Already it begins to find its place in statutes and written constitutions, and, in the only example of a democratic unwritten constitution, the British, the acknowledged part played by party is enormous. When we shall have penetrated into the secrets of Parliaments and Cabinets, Presidents, Kings and Departments of State,

<sup>1</sup> Cf. Elihu Root, *The Short Ballot and 'the Invisible Government'* (address before the N.Y. Constitutional Convention, 30 Aug. 1915): 'From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill, down to the present time, the government of the state has presented two different lines of activity, one of the constitutional and statutory officers of the state, and the other of the party leaders—they call them party bosses. They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government".'

we shall have good cause to underline, and underline again, this judgement founded as yet only upon the Party's electoral activities.

For we have seen that without Party the electorate would be 'atomized', as it was intended to be, in the vague speculations of the school of Rousseau. To-day it would not be split into millions of personal fragments, but into groups and congregations: wherever there is an associated activity of man there is conscious organization. Without Party there would be but Churches, Trade Unions, Employers' and Professional Associations, Schools, and Universities, various kinds of consumers' associations, states in a federation, and municipalities—in short, all the organized human fellowship-bands, seeking for all and for themselves that which their own ethic dictates. Modern Political Parties, not all in the same measure, but all in some measure, absorb the members of these associations into their larger and wider fellowship. They act with an interest in, and a doctrine of, the State. The hard and fast line between them and a smaller group is not to be found; we can only say that while political parties are built with the essential purpose of capturing the power of the State or of influencing the parties large enough to obtain it, other groups, like a teachers' or miners' association, have purposes which are ends in themselves, though these may, and often do, come into contact with political parties, and need political support to grow or defend themselves. They cut across these groups, include them, marshal them, and form wider fellowships, seeking the solution of problems which arise altogether, or in part, outside these lesser groups, problems which may arise out of the relations between them, and which concern not only those immediately affected, but others away beyond, who *may* be affected thereby.

By degrees, which, to the ordinary citizen, were imperceptible, these nation-wide fellowships have come into being and organized themselves with a gigantic and complex apparatus. They possess buildings and newspapers, printing-presses and advertising experts, songs and slogans, heroes and martyrs, money and speakers, officials and prophets, feast-days and fast-days; like all religions, they disrupt families and ostracize heretics, and among their agencies of discipline and subordination are the novitiate and penance. They bear many resemblances to the churches militant, but their eyes and minds are directed more immediately to the Legislature and the Departments of State, for there lies the power and the glory.

It is apparent already, and the next chapter will more abundantly show, that in our own day political parties have partially usurped the power of the Legislature. They make policies, create platforms, obtain seats in Parliament: and if they attain a majority the platforms tend to become laws. No sooner, in fact, did party organization in England suffer the change connected with Schnadhorst, Chamberlain and the

Birmingham caucus, than people already coined the term a 'Parliament outside Parliament'. The chiefs of the parties did not remain idle until the House of Commons met, but went to the electorate, with their proposals. The elder statesmen, among whom we may include Queen Victoria, were much excited. The election of 1874 first witnessed this practice on a really important scale.<sup>1</sup>

The facts are patent: the phenomenon appears in its least qualified form where the two-party system exists, with real differences between them, and this is in England.

In other countries it is modified by the multiplicity of parties which must make Parliamentary coalitions before their legislative work can be effected: in the U.S.A. there is the interference of the Congressional obstacles caused by the separation of powers. But, though in a different measure in different countries, the power more and more departs to Parties.<sup>2</sup> So far has this process gone that the English system has been deliberately characterized as 'plebiscitical'.<sup>3</sup> To the question why has the House of Commons ceased to be a deliberative assembly, the answer was given by Lord Robert Cecil: <sup>4</sup>

<sup>1</sup> Lord Shaftesbury, the stiff-necked philanthropist, wrote: 'It is a new thing and a very serious thing to see a Prime Minister "on the stump"'. Surely there is some little due to dignity of position' (Hodder, III, 349).

Selborne, then Lord Chancellor in Gladstone's Cabinet, wrote afterwards that 'an electioneering address from the P.M. propounding by *anticipation* (my italics—*Memories Personal and Political*, I, 330) a popular budget, was a dangerous as well as a new thing'. Gladstone, with his marvellous nose for the political weather, said (1880, to Lord Rosebery): 'What is outside Parliament seems to me to be fast mounting, nay to have already mounted, to an importance much exceeding what is inside.' Lord Hartington expressed the change emphatically: 'But undoubtedly it is the fact that, during the last two or three sessions, comparatively little interest was taken in the debates in Parliament. Is not the cause to be sought for in this, that the nation is beginning to feel that Parliament has ceased practically to control the issue of our policy? Long experience—the experience of five years—has proved that the Government has only to decide and to act, and that it is absolutely certain that whatever decision or action the government resolves upon will be confirmed by the present House of Parliament' (Speech at Manchester, 24 Oct. 1879 (*Times*)). Jephson, '*The Platform*' (first pub. 1892) was the first large (though discursive) work written upon this question.

<sup>2</sup> For Germany, the subject is best treated by Triepel, in his essay, *Die Staatsverfassung und die politischen Parteien* (1930), cf. p. 18: 'The constantly increasing strength of the democratic idea has narrowed and finally almost destroyed the independence of Parliament, the originality of its resolutions born in consultation and debate, the independence of the members of extra-parliamentary influences, the freedom from subordination by the Group. Party organization attacks parliamentarism from outside and inside. It subjugates the electors and drives them more and more into its net. It subjugates parliamentary procedure in all its stages and directions. The connexion between the extra-parliamentary parties comprising Districts and States and their parliamentary exponents, the Groups, becomes ever closer. The resolution of the parliaments are prepared by consultation and votes in the Groups. Discussion in the Assembly, even in its Committees, becomes an empty form. Parliamentary resolutions are, if Parliament has an homogeneous majority, a party resolution; if the parties are small a party compromise,' etc., etc.

<sup>3</sup> This was no mere phrase to describe a transient event, but the logical conclusion of a long and close discussion of Parliamentary procedure.

<sup>4</sup> Select Committee on House of Commons (Procedure) Evidence, p. 56, Q. 919-24 (378, 1911).

'I should say that if you really looked into the real principle of our constitution now, it is purely plebiscitical, that you have really a plebiscite by which a particular man is selected as Prime Minister, he then selects his Ministry himself, and it is pretty much what he likes, subject to what affects the rule that he has to consider—namely, that he must not do anything that is very unpopular.'

There, indeed, is the creator of policy, the energizing and dynamic organ of Parliamentary government. There the issues are raised, defined, brought before the people and discussed, once more defined and brought to Parliament where occurs the final process of distillation and discussion. But the full meaning of this process is to be understood only after analysis of the function of Parliaments. Let it not be forgotten that while Parliament's part is discussion, the Party's rôle is decision.

Indeed, the phenomenon of party government is, if we regard it at a distance, really remarkable. Does it not need an extraordinary restraint upon human passions to permit, as part of the ordinary machinery of government, an organized opposition to undermine the government of the day, to enter upon weeks, nay years, of demagoguery and militant electoral tactics, to excite the people, and return, perhaps, with the power of reversing former decisions, and in England, even to amend the basic institutions? It sounds, and in other days would have been judged, like treason, disruption, revolution, a battering at the foundations of the State.<sup>1</sup> It would have been met with executions, proscription, the suppression of freedom of opinion, and open violence. The change in manners in the Western world is immense, for though not every kind of tactics is allowed, the laws, written and unwritten, regulating them are equally binding on all the combatants and they are severe, considering the rather untameable disposition of man.<sup>2</sup> Not all countries which adopted Parliamentaryism were able to create and maintain these rules of electoral self-control. In some, as for example in Italy, parliamentary and electoral tactics were singularly corrupt, victory, impure and simple, being the paramount consideration, victory for office the next consideration, and victory for policy the last. It was as though the morals of the *Prince* had been pawned with the Parties, and the difference between one age and another simply an affair of the one or the many, the Court or the Caucus. Nor has that country, under Mussolini, nor Russia under the Bolsheviks, yet been able to admit that an opposition party or parties should be allowed to live and win whatever support among the people they are able.

<sup>1</sup> Thus in the discussions of 'faction' in Bolingbroke, *Dissertation upon Parties*, and in Rousseau.

<sup>2</sup> On the theory of party differences as an immediate issue of biological characteristics, see the literature reviewed in Koellreutter, *Die politische Parteien in Modernen Staat*.

Democratic government will not stand or fall, it is not efficient or inefficient, in the measure of Parliament's qualities : it rests, in its hopes and doubts, upon the party system. There is the political centre of gravity.<sup>1</sup> If the parties are divided upon sincere issues, fully conscious of their public duty as of their public power, equipped with the expertness which tempers desire with possibility, and if they conduct their campaigns with restraint, making the commonweal, and not victory, the standard of their rhetoric and militancy, then we may hope for not only the continuance of democratic government, but for its improvement. If the divisions among men correspond to merely personal, factional or sectional disputes, and, further, cannot be amicably assembled in parties not confusing to the electorate, if desire for complete victory wrecks temperateness, and passion blinds to truth, if the men who form the organizations are not considerate and patient in their research and pursuit of policies, and do not establish a permanent and generous reciprocity in matters electoral, if they cannot rise above the level of catchwords, office for office sake, and narrow-minded belligerency of phrase and tactics,—in that measure not only is democracy despised by those who are the victims of party tactics, but a rot enters the vitals of the actors themselves. This is the testing-time of democracy : and this means the testing-time of political parties. The countries which can pass the test are remarkably few, but one good is that the problems are being perceived. A tremendous distance has been travelled if we can say that to-day a party is not deemed to be fighting outside the State against the State, but inside the State against the government. Where this is denied, party government, and with it democratic government, at once ceases.<sup>2</sup>

The remarkable thing is, as we have already mentioned, that there are so few parties, even in the countries where there are so many. Why are there not more ? Any singularity of view is, by hypothesis, held by a small number, and a small number cannot, by itself, and independent of the aid of any large party, carry through its policy. It cannot, as we shall show abundantly in a later chapter, even obtain sufficient time to state its case in the representative assembly, so great is the amount of business, even the routine, of the modern state. The priority and the substance of parliamentary discussion is necessarily settled by the larger parties. The protestant then has the choice, either to maintain his principle and be forced into conscious political impotence, or to swallow his doubts and take them inside that party which is, otherwise, most favourable to his policy. From the outside

<sup>1</sup> Cf. the discussions in Merriam, *The American Party System*; and Lowell, *Public Opinion and Popular Government*, cf. Koellreutter, *Die politischen Parteien in Modernen Staat*.

<sup>2</sup> The best example is the condition of German parties before the War when every non-governmental party was described as *Vaterlandslos*. Cf. Bülow, *Imperial Germany*. Now, of course, both Italian and Russian régimes hold the same view.

the heterodox has rarely a chance of success : once inside the party he may, perhaps, barter his counsel, support and services for a recognition of his own demands. This practice has been commonest in England, and has gone to swell the chorus of Continental opinion that the Englishman is hypocritical. But in fact the Englishman is devoted to results in terms of action, not the satisfaction of knowing that he is consistently supporting an entirely hopeless principle for its own sake. Even on the Continent compromise must be and is practised, for, in fact, men want government to continue, whether a majority is found or not. Principle, some might call it philosophic idiosyncrasy, is, however, not so easily sacrificed here to the necessary unity which preludes power. Another cause of the fewness of parties is the method of election, which by splitting up the country into constituencies, necessarily splits up the supporters of the small groups as well as of the big parties. This dispersal of the votes leads in the single-member constituency system to a loss, perhaps, of any representation : unless all the voters are sufficiently concentrated in one or more constituencies. Proportional Representation, as we shall see, keeps them alive : but even so the hopelessness of a small minority encourages adhesion to some larger entity. Though dissentients may be condemned to political exile, because of the tremendous difficulties in building a new party, this is, however, no justification for not clearly avowing opinions honestly held, nor any justification for the cowardice of not going into the wilderness to attempt the formation of a new party. For what will be gained in office, power and half-measures or promises, will be lost in the possible effect upon opinion, whose strength can, after all, not be really gauged until one has staked one's career upon its exploration. Too often life is killed by office.

Can democratic government exist without party government ? Such a wish is often expressed ; for it is part of the nature of the party system that able men shall be in the party of the ' outs ' and that among the ' ins ' there shall be some less capable by comparison. The sensitive, also, despair of the trickery, intrigue, bad faith, and systematic lying which are essential parts of party warfare.<sup>1</sup> The answer is obvious : only when there is unanimity among all citizens upon all problems. Even dictatorships are troubled by the latency of opposition parties. Once in a century a situation arises when parties cease to exist : when the required basis of unanimity arises : in a war, where, without the concentration of all forces, nations are in danger of being conquered by a foreign foe. Then, as in 1914, there is established a '*Union Sacrée*', a 'coalition', or '*Bürgerfrieden*'. For, in the beginning, is one's soil and nation : without this, party

<sup>1</sup> Croce says : 'The constantly recurrent dream of the popular thinker is the great Unity Party, the party of sound and upright men ; a party which would have only one defect—that of being a party and being political.'—*Grundlagen*, p. 23.



differences cease to be free, and the struggle is converted into one against the external enemy. The affinities between the parties of different countries are forgotten : and their nationality is fought for as the field in which their principles may have effect. But even the example of the War shows how difficult unanimity is for any length of time. Within a few months of the outbreak began disputes relating to war aims and the prospects of peace. Nor did the struggle between rich and poor come to an end. It was even intensified by their unequal burdens. Once grant the general right to dissent, and both the nature of man and his environment must continue to produce parties.

So important has the work of parties become in the education of the electorate, the marshalling of voters, the preparation of policy, that various suggestions have been made that they be subsidized by the State in order to prevent them from drawing funds from doubtful sources. In America, where the Party machine is most heavily burdened, this demand is naturally most frequent.<sup>1</sup>

**Each Party has its own Dictionary.** It is a necessary consequence of party government that the same language used by different parties be charged with a different meaning. It is impossible for such different minds to be at one in the use of the same word : all the bias of mind and party is carried into speech. Thus : incompetence, means doing too capably what we do not like ; then capitalist, first, a rich man giving employment to those who would otherwise starve, and again, an exploiter of labour, living not by work, but by unearned income sucked from the blood of wage-slaves ; next, constitutional is Me, and whatever I care to do, while Unconstitutional is everything my opponent attempts. To some, patriotism is obedience to the existent authority and social system ; to others it implies destruction of the *status quo* in order to reform. Taxation is confiscation ; indeed,

<sup>1</sup> In 1907 President Roosevelt suggested that congress should provide an appropriation 'for the proper and legitimate expenses of each of the great national parties . . .' (*Congressional Record*, 3 Dec. 1907). This proposal was not well received, but in 1910 Colorado adopted a law providing that the chairman of each political party should receive from the public money 25 c. for each vote cast at the previous election for the nominee for governor of that political party. . . . This statute was held to be unconstitutional (1911, *McDonald v. Calligan*). Other states, notably Florida, North Dakota and Oregon, have experimented with an official bulletin in which the principles of all parties are expounded. The Oregon law of 1908 provided that 50 dollars per page should be the charge for insertions in the 'publicity pamphlet' ; the maximum allowance of space being two pages for an independent candidate and twenty-four for a political party. Cf. Sait, *op. cit.*, pp. 513-16 ; Sikes, *op. cit.*, pp. 249, 250 : 'If the votes the candidates received in the previous election should be used as a basis, this scheme would give added support to the party in power, and there would be little chance for the development of a new party. If the lump should be granted to each party entering the campaign, an inducement would thereby be offered for the organization of all sorts of political faddists. . . .'

In 1920 Bryan urged the Democratic convention to advocate a Federal bulletin 'under the fair and equitable control of the two leading parties'. . . . This proposal had been made in a somewhat similar form by Mackaye in the *Independent* (1908), when commenting on President Roosevelt's proposal (Sait, *op. cit.*, p. 514).

it is theft ; but appears again as the beneficial equalization of wealth and opportunity. ' A mandate from the electorate ' is, to the victors, ' we may do as we like ', but to the vanquished, ' the country rejected the whole of your programme, and really elected us ! ' Property is the incentive to work and its sacred reward ; but many call it theft. One and the same Communist is a man who loves the people and seeks their good in equality and co-operation ; but the reverse of this medal reveals a murderer, a wanton destroyer of State, family and religion. His friend the Bolshevik is two different things, standing on the same spot at the same time ; namely, an exponent and practitioner of Marxian doctrine as applied to Russia, and a regicide, an international revolutionist, a class-warrior, a free-lover, and, to boot, a cannibal ! Traitors abound in history, and even to-day : but some judge them to be rascals, who put themselves and others, especially foreigners, before their ' own ' country, from ' unworthy ' motives, while others set them in a noble light, as independent and disinterested critics. Anything that our opponents demand is sectional ; all that we propound is national. The pacifist appears as a coward or a weakling, or as a hero, martyr, a friend of the human race. The People is variety itself : the mob ; the poor ; the ignorant ; the dregs ; any-one outside ' our circle ', or none but those in it ; the others ; God ; political authority ; the State. War is murder or the highest virtue ; self-sacrifice for an ideal, or defence of home and civilization. Imperialism is a civilizing mission, or conquest and exploitation. Economy is spending much, but wisely, on the best for the greatest number : and, alternatively, the least public expenditure or, better still, none ; while extravagance is economy, or anything spent (according to some) otherwise than on education ; or, (according to others) anything spent otherwise than on Police, Army and Navy. To the Government the closure of debate is the Allocation of Time, to the Opposition, it is the ' Gag '. Electoral propaganda is both Education and Demagogery, but which it is depends not on the thing in itself, but upon political opposition between the practitioner and the critic : when one party says it is ' seeing that the people get a square deal ' by protracted debate, and ' maintaining the rights of the minority ', the other side calls this partisan ' obstruction '. Most arguments put by your opponents are merely to create party capital, but all of your own are actuated only by the public welfare. Finally, all parties are ' Truly National ! ' <sup>1</sup>

So does mind collide with mind, and the one is pronounced right, the other wrong. But the political *scientist* cannot give judgements of

<sup>1</sup> Jentsch, *Die Partei*, Frankfurt, 1909 : ' It is unfair (of German conditions) to decorate oneself with fine names like liberal, independent, progressive, national, conservative, king-faithful, kaiser-faithful, empire-faithful, state-supporting (*Königstreu, Kaisertreu, reichstreu, staatsertreu*) and thereby to denounce opponents as subversive or traitors or as servile or reactionary.'

this kind. He has only to recognize that, apart from any ethical standard, men may differ and all may be right. That which gives human affairs, and politics in particular, a tragic quality is this very fact : that with all their strength and passions men contend with each other even unto murder, and yet they cannot utterly resist the urge which is inherent in them, nor can they ever be fully its master. They may intelligently comprehend the ideals of their opponents, but they can never *feel* them ; they will never master and overcome that which seethes within them. Nor can they depersonalize themselves, and see their own driving impulses in a cold white light. Not brain alone directs our actions : that is a view long exploded by psychology, and now finds a place only in the doctrines of those in whom the intellect is one instinct overpowering the rest of their instincts ; we are swept along by that almost inexplicable entity—the body-mind or the mind-body : what this entity receives is already strictly individual, for everything, sight, sound, touch, hearing, taste, nerves, muscles, endocrine glands, are congenitally individual ; so also, in their peculiar combination of weakness and strength, are these things in their response. We cannot make an exit from ourselves, and to live at all, we are obliged to assume that the self is at least as good as anybody else's, and no one on earth can produce a system of graded virtues which is universally valid. Only in the remotest degree is there any unity, that is, in the degree fraught with least meaning for human beings : men are united in God, or the *Nicht-Ich* of Fichte, or the *élan vital* of Bergson, or the Life Force of Shaw, but only through the members of the individual mind and body are their surging impulses felt and expressed.

For the man of religion some are saved and others damned ; for the teacher some are ethically right and others wrong ; for the politician the world is divided into the righteous We and the wicked They. For if life is to be lived, it requires successful assertion ; self-belief springs eternal, and is fostered as realization demands it. But the scientist who seeks to understand, and not to govern, must be content with observation of the source of these differences. It is for him to say that all parties to a controversy are inspired, that what is considered ugly, vicious and cruel by one side, is, for the other, all that it can know of the sublime, causing those who cherish it to experience here and now the delights which men have ascribed to Paradise, moving them to a sacred nobility and self-sacrifice, to a happiness immeasurable, when ventures are successful, and, in the days of adversity, to sorrow and longing of overwhelming poignancy. Where men can live in harmony, then, let us be thankful, but when they war against each other, in parties, nations, or by ' crime ', let us understand first, and judge afterwards.

Along these diverse channels men would move to the extreme

boundaries of their faith were it not for the organized counter-action of parties. For men are impelled to a complete establishment of their own Good, and even its forcible fixture upon others. Parties mutually check and control the militant extension of ideals. In this organized interplay of forces each learns the most important truth in politics, that in order to win one's way to development, some part of the way must be given up, either substantially, or in terms of time; that it is possible to destroy every hope by insistence upon all. These organized bodies more easily find and hold to the terms of reciprocity than dispersed, inarticulate persons. For they have the technical apparatus with which to accomplish this purpose, and they tend to acquire a sense of honour and self-respect; that is, a sense that promises given and accepted must be fulfilled.

\* \* \* \* \*

At this point we must pause in our analysis of party. We have been concerned with its function among the electorate, but were not able to dissociate that function from its parliamentary and executive functions. We knew at the outset that dissociation was impossible, and, in fact, without an appreciation of party activity within the context of the next two chapters, the treatment is vitally incomplete. But this only goes to show the wide grasp and energy and radical significance of political parties. Until we have completed that survey it is not worth while summing up the meaning of Representation in Representative Government. But when we have seen how parties function in Parliament and the Executive we shall be in a position to discuss that question, and to notice recent criticisms of Representation. At that stage also we can discuss with a much better appreciation of the real issues, the problem of Proportional Representation, the devices known as the Referendum, and the Initiative, the problem of the congestion of Parliamentary Assemblies. We pass, then, to analyse the composition and procedure of Parliamentary Assemblies.



## PART V

### PARLIAMENTS

#### CHAPTER XVI. PARLIAMENTS: GENERAL PROBLEMS

#### CHAPTER XVII. SECOND CHAMBERS

‘ A political institution is a machine : the motive power is the national character. With that it rests, whether the machine will benefit society, or destroy it. Society in this country is perplexed, almost paralysed ; in time it will move, and it will devise. How are the elements of the nation to be blended again together ? In what spirit is that reorganization to take place ? ’

—DISRAELI.



## CHAPTER XVI

### PARLIAMENTS : GENERAL PROBLEMS

**P**ARLIAMENTS,<sup>1</sup> assemblies chosen as we have already described, meet to accomplish a variety of functions : to make laws, to control the executive, and to carry out a few judicial functions. In a former chapter we discussed the evolution and the present distribution of powers among the various branches of government, as also the nature of each, and we found that although there is no absolute separation of powers, there is a strongly-marked distinctiveness of function, that each institution is occupied with a mixture of functions, but that its central occupation is different in kind from that of its collaborators. That of Parliaments is to apply the presumed will of the people to the creation of laws and the superintendence of their administration. Their judicial power becomes of less and less importance, and nowadays is almost wholly exercised by extremely specialized bodies.

**The Mandate of Parliament.** The relationship between the will of the electorate and parliament has already been treated in some measure, but as we explained, that relationship must be viewed from the angle of parliament as well as from the angle of parties. The candidates have been nominated, they and the party have associated, they have duly become members of one or other of the assemblies : what is their duty ? How far may they proceed ? What powers have they ? Are they now free agents to do absolutely as their own discretion dictates ? Or must they seek instructions from those who elected them ? These questions were raised as soon as parliaments began to meet on the express or implied assumption that they 'repre-

<sup>1</sup> I use the term 'Parliaments' rather than either Representative or Legislative Assemblies, since 'representative' rather glosses over all questions about the nature of representation and puts such bodies as the British House of Lords, and nominated Second Chambers, like the Canadian Senate, in an anomalous position, while the assemblies in democratic countries do more than merely legislate or deliberate : they exercise in various degrees a control over the executive. The broadest term is, therefore, the best—'Parliament', in the English usage (the House of Commons and the House of Lords) ; 'Congress' in the American (the House of Representatives and the Senate) ; the 'Chambers' in the French (the Chamber of Deputies and the Senate), and 'Popular Representative Body' (*Volksvertretung*) in the German (the *Reichstag* and the *Reichsrat* in the Empire) ; and in Prussia, the *Landtag* and the *Staatsrat*.



sented 'some body corporate or area. They were raised, for example, in relation to the *États Généraux* of France where it was accepted that delegates could not think or act, *faute de charge spéciale*<sup>1</sup>; they were raised in England in 1647<sup>2</sup> in the Agreement of the People. They were raised in America with a special emphasis after the War of Independence.<sup>3</sup> The subject was fiercely discussed by the French Constituent Assembly,<sup>4</sup> and in England, the claims to parliamentary representation of the new and powerful commercial interests first forced a famous opinion from Burke, and next compelled a reform of parliament, and this, naturally, put the matter in a new light. The issue raised was, and is, that of the Mandate of the Member: is it imperative or is it discretionary, and if discretionary how far may discretion go? In English terms it has resolved itself into the problem of Delegate as against Representative. The British Constitution offers no written guidance upon this, but where there are written constitutions (though not everywhere) a definite rule is laid down, which squares with Burke's reading of the British Constitution in his own time and the general view rather vaguely held now by most members of parliament. The Organic Law on the Election of Deputies of France<sup>5</sup> says: 'All imperative mandates are null and void'; and that of Germany<sup>6</sup> says:

<sup>1</sup> Cf. Picot, *op. cit.*, V, 145 ff.

<sup>2</sup> Cf. Gardiner, *Constitutional Documents*, 3rd Ed., Oxford, 1906, pp. 368, 369: 'That the Representatives have, and shall be understood to have, the supreme trust in order to the preservation and government of the whole; and that their power extend, without the consent or concurrence of any other person or persons, to the erecting and abolishing of Courts of Justice and public offices, and to the enacting, altering, repealing and declaring of laws, and the highest and final judgement, concerning all natural or civil things, but not concerning things spiritual or evangelical. Provided that, even in things natural and civil, these six particulars next following are, and shall be, understood to be excepted and reserved from our Representatives. . . . (6) That no Representative may in any wise render up, or give, or take away, any of the foundations of common right, liberty, and safety contained in this agreement, nor level men's estates, destroy property, or make all things common: and that in all matters of such fundamental concernment, there shall be a liberty to particular members of the said Representatives to enter their dissents from the major vote.'

<sup>3</sup> The revolutionary constitutions had given great power to the legislative bodies, whilst restricting the scope of the executive. In the years immediately following 1776, hostility to the increased powers assumed by legislators was manifested in various ways. It was claimed that liberty was thereby endangered, and the constitutional and governmental equilibrium disturbed. Jefferson was cited in connexion with Virginia where 'all the powers of Government result to the legislative body' and '173 despots would surely be as oppressive as one'. Cf. Merriam, *A History of Political Theories*, p. 110. Cf. also Gettell, *History of American Political Thought* (1928), pp. 136, 142, 143.

<sup>4</sup> Pierre, I, 311, and Chap. XI, *supra*.

<sup>5</sup> 30 Nov. 1875, Article 13.

<sup>6</sup> Const., 1919, Art. 21. The Prussian constitution of 1919 has a similar article (10): 'Representatives vote according to their free conviction determined only by regard for national welfare; they are not bound by orders or suggestions.' Together with this, Art. 9 must be taken: 'The diet consists of representatives of the Prussian Nation. Representatives are representatives of the whole nation. . . .' Cf. Austria, Const. (1920), Art. 56; Czecho-Slovakia, Const. (1920), Arts. 22 and 23; and Switzerland, Const. (1874), Art. 91.

'Members are representatives of the whole nation. They are subject to their conscience only and not bound by any instructions.' But these are counsels of excellence rather than rules enforceable in the Courts, for no country has established practicable machinery for their enforcement. As regards Germany, it has been said that the rule belongs 'rather in a catechism than in a constitution'.<sup>1</sup> Once only has punishment followed upon a definite acceptance of a mandate in France: invalidation of the election of the successful candidate who accepted a mandate, but, since the *bureau* of the Chamber which examined the case was composed politically, and not judicially, we may suspect that considerations of party advantage determined the issue.<sup>2</sup> Law and practice have since then inclined towards the freedom of the member, for the Commission which prepared the law of 3rd November 1875, deliberately refused to accept the grave penalty of annulment of the election.<sup>3</sup> It accepted the alternative, which not only gives the member his freedom, but gives him a statutory defence against exigent constituents: it declared the imperative mandate null and void; or, in other words, the law says to the candidate: 'Declare what you like, that business is between you and your constituents, and if you make any definite promise you will not be punishable by the Chamber: but whatever you have promised, know hereby that it has no effect. You are absolved!' The Chamber of Deputies has decided against the nullity of an election contested because an imperative mandate has been accepted.<sup>4</sup> It has been decided also that Article 13 of the Constitutional Law of 1875 prevents any penal sanction from *confirming* the nullity of mandates: for no member of the Chamber may be prosecuted for opinions or votes uttered in the exercise of his functions.<sup>5</sup> Against those who clumsily obtrude the mandate, which, in fact, all members ask for and obtain, and to which they, in a certain degree, feel obliged, but which they pretend to ignore, a stiff though dignified protest is made: for example, the President of the Chamber, the Reporter of a Commission, must protest when a member refuses to withdraw an amendment because he says he has received a mandate to defend it.<sup>6</sup> There is thus theoretic freedom, but if, in electoral practice, the member is bound, there is no punishment. So do men play hide and seek with their consciences; for to admit the existence of a thing which does exist, may, they believe, cause its pathological growth. There is much good sense in this view, and its significance will appear later.

In Germany the Constitution speaks, as we have seen, with uncom-

<sup>1</sup> Cf. Morstein Marx, *Rechtswirklichkeit und Freies Mandat*, p. 435.

<sup>2</sup> Pierre, loc. cit., p. 312.

<sup>3</sup> Ibid., p. 313.

<sup>4</sup> Nov., 1893.

<sup>5</sup> Pierre, *Supplément* (1924), p. 437.

<sup>6</sup> Ibid., footnote 3.

promising directness, and one of the ablest commentators has said that 'the exercise of this function (*Organschaft*, or action as an organ of government) should take place in complete independence of everybody : of party, social class, groups seeking special interests to which the member belongs, and even of constituents. That is the intention of the second sentence of the article'.<sup>1</sup> He says further that it is a moral duty, but a legal one too : and one, moreover, which binds you to consider all your actions and connexions in the light of their compatibility with the public welfare. It is even argued that one cannot be bound by a caucus of one's party.<sup>2</sup> It is clear, however, that these desirable things are not *secured* by the law, and in fact the whole discussion soon takes on that same negative character which it has in France. It all comes to mean that the member can *not legally be bound* to instructions : that is, that he is free of them : for it is against the Constitution to be otherwise. But the real political question is not answered : if the candidate makes promises or they are demanded of him as a condition of votes, is there an institution which will intervene, and is such intervention fitting ?

The answer is that the law has created no institution to deal with such a breach of the Constitution, if we except the Electoral Court, which has never yet been called to decide such a case. The law only provides that any such arrangement is legally null ; that contractual arrangements whereby gifts and other amenities<sup>3</sup> are accepted to promote special interests, can be punished as bribery.<sup>4</sup> One important case has occurred since the Constitution, in which a Communist member of the Hamburg Parliament was caused to resign by the handing in of a declaration which he was alleged to have signed in blank as part of the regular procedure of the Party, but which he denied he had done. He also denied any wish to resign. In debate the Communists argued that such blank-form resignations were regular features of their organization, justified because 'the member held his mandate not as a person but as a member of the Party, and that therefore the Party could always exercise its influence upon the carrying out of the mandate'<sup>5</sup> at any time, and also had the right to nullify his mandate'. The Committee declared its indifference whether the signature was the member's or not ; the Constitution of Hamburg included the terms of Article 21 of the Reich Constitution and this settled the issue. For

<sup>1</sup> Anschütz, *Die Verfassung des deutschen Reichs* (Edn. 5), p. 115 ; Poetzsch-Heffter (*Handkommentar zur Reichsverfassung*), op. cit., p. 161 ff. The history of this subject for Germany is given in Hatschek, *Das Parlamentsrecht*. Cf. also the treatise of Leilholz, *Das Wesen der Repräsentation*, 1930.

<sup>2</sup> Cf. Anschütz and Thoma, *Handbuch des deutschen Staatsrechts*, I, 419.

<sup>3</sup> *Bürgerliches Gesetz Buch*, Sect. 134.

<sup>4</sup> It is argued against this that the B.G.B., Sect. 138, Heading 1, should be applied ; this says that a legal action which is contrary to good morals is null and void : since this would give the ability to distinguish between necessary and unnecessary actions (*Strafgesetzbuch*, 331, 332).

<sup>5</sup> Morstein-Marx, op. cit., 432.

such a signed declaration would make it impossible for a member to act according to his conscience ; moreover, it deceived the voters, for they give their votes to the candidate on the assumption that he is not bound to an undisclosed obligation. Against this decision the spokesman of the Communist Party argued that as Germany had a list-system of Proportional Representation and as the lists, rather than the individual members, were voted for, it was unavoidable, as well as desirable and proper, that the Party should discipline its members and alter its list. Nor was that all. The *democratic principle* required that the Party should have the right of removing a member who defaulted from the terms of their united policy.<sup>1</sup>

The German Parliament is peculiarly liable, for reasons we have noticed in our discussion of parties, to the entrance of representatives of special groups, and has attempted to control them, but so far without success, by a change of the constitution or the standing orders of the Reichstag.<sup>2</sup> The British Parliament excludes government contractors and government officials ; in France, officials and government contractors are excluded. This branch of politics and constitutional law has by no means received either the theoretical or practical attention it deserves.<sup>3</sup>

According to English law, Parliament is sovereign. The Constitution knows nothing about the people. Therefore, in strict law, once a person has become a member he is free to act as his own mind dictates, and is entitled to reject demands made by anybody.<sup>4</sup>

In the U.S.A. the Constitution speaks in the words of the Bill of

<sup>1</sup> Morstein-Marx, *op. cit.*, who reports this case with commentary, gives several other instances of party arrangements for the resignation of members (p. 444 ff.), and this in other parties besides the Communist.

<sup>2</sup> E.g. 26 Aug. 1924. A resolution of amendment to Art. 21 of the Constitution, running as follows: 'Representatives may only accept directorships in private business if this activity is directly connected with their usual profession. In cases of conflict the Supreme Court of State for the German Empire decides.'

19 May 1927. *Resolution*: 'Members of this House report to the Presiding Officer all their business relationships in so far as they serve on the boards of directors or management of companies. The Council of Elders shall decide from case to case whether the member who is a director of any company shall participate in legislative work.'

<sup>3</sup> Cf. Werner Weber, *Parlamentarische Unvereinbarkeiten*, in *Arch-des-öff. Rechts*, 1930, 161 ff.

<sup>4</sup> 'The *privilege* of Parliament is likewise very large and indefinite. It was principally established in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. . . . Some . . . of the more notorious privileges of the members of either house are, privilege of speech and of person. As to the first, privilege of speech, it is declared by the statute I.W. and M., st. 2, c. 2, as one of the liberties of the people, 'that the freedom of speech, and debates, and proceedings in parliament ought not to be impeached or questioned in any court or place out of Parliament' (Blackstone, *Commentaries*). Similarly Anson, *Law and Custom of the Constitution* (1897), Part I, Chap. V, p. 147. Cf. May, *Parliamentary Practice*, 13th Ed., London, 1924, Chap. III, p. 70.

Rights : ' and for any speech or debate in either house they (Senators and Representatives) shall not be questioned in any other place '.<sup>1</sup>

Thus the laws, whether ancient or modern, incline to freedom of the member and ignore the actual nature of his present relations with his constituents. Yet in every country the facts deviate from the law, though the facts themselves allow the member considerable freedom. How much he is bound depends clearly upon the nature of the electoral process, and the part played therein by the local and the central caucuses of the political parties, a fact with which the law has not yet attempted to reckon. As the nineteenth century wore on there was in England and America and later in Germany a gradual strengthening of the idea of delegation and a weakening of that of representation.

Burke's theory gave the balance of power to the member. The movement of opinion leading to the struggle of 1832 consisted, naturally, of the Whig claim for delegation and the Tory claim for virtual representation.<sup>2</sup> What was particularly in the mind of the former and what gives the question its present-day importance, is the fact that it is manifestly impossible for parliaments to be dissolved and re-elected so often that their will and that of their constituents can be deemed to be in perfect harmony. Parliaments, to act with effect, even to act at all, require such a length of life that the difficult problem arises of the connexion between the constituents and the delegates between elections. How can this problem be solved ? It is soluble by strict instructions at the outset, and to this must be added the short duration of parliaments—even that is not enough ; the people must exercise pressure upon Parliament through public meetings.<sup>3</sup>

<sup>1</sup> Const., Art. I, Sect. 6, para. 1.

<sup>2</sup> *Edinburgh Review*, November, 1812 : ' The delegation of the greatest of all trusts—that of government—necessarily implies a surrender of the function itself, and with the function much of the power, and leaves the people in some degree at the mercy of those whom they choose for their trustees during the whole term of the appointment. Hence the danger of those trustees abusing their delegated authority in such a manner as to weaken the control of the people over them—they rendering themselves more powerful and less accountable to make the assumption of the trust more difficult. It is quite manifest, therefore, that there is nothing of which the Constitution, in a State like England, ought to be more jealous than any steps towards independence on the part of the representatives—any attempt of theirs to acquire a substantive and separate authority—either an existence not created, or attributes not bestowed by the people.' This savours strongly of the principle of delegation or strict accountability.

<sup>3</sup> Lord Brougham, in his *The British Constitution* (1860), pushes the analysis further : ' The essence of representation is that the power of the people should be parted with, and given over, for a limited period, to the deputy chosen by the people, and that he should perform that part in the government which, but for this transfer, would have been performed by the people themselves. All these several things must concur to constitute representation.' The first thing, the only one which we need reproduce here, is that ' the powers must be parted with, and given over '. ' It is not a representation if the constituents so far retain a control as to act for themselves. They may communicate with their delegate ; they may inform him of their wishes, their opinions, their circumstances ; they may pronounce their judgement upon his

This Tory doctrine rested upon two pillars : (a) the incompetence of the constituent to legislate for himself, and (b) that the locality has not the right to press its views to a conclusion against the interests of the country.<sup>1</sup> We shall see that these are material elements of the problem not only deserving but commanding an important place in the final decision of the question. But the whole tendency during and especially after the Reform Bill struggle was towards definite pledges. Francis Place tells, for example, how the National Political Union decided that the opinions of all candidates on all the great leading questions should be accurately obtained and pledges on those alone demanded.<sup>2</sup> Its leaflet of the 11th July 1832, on the subject of pledges ran :

‘Every elector should recollect that his representative is elected for the unreasonably long period of seven years, and that he may therefore set his

public conduct ; *they may even call upon him to follow their instructions, and warn him that, if he disobeys, they will no longer trust him, or re-elect him, to represent them.* (My italics. This is Benthamite insistence on accountability with a vengeance.) But he is to act—not they ; he is to act for them—not they for themselves. If they interfere directly, and take the power out of his hands, not only is the main object of representation defeated, but a conflict and a confusion is introduced that makes the representation rather prejudicial than advantageous.’ He wavers a little, perhaps thinking of the practical difficulties : ‘Those deputies fully and freely exercising that power instead of the people.’

<sup>1</sup> Though Sir Robert Peel resigned his seat at Oxford upon his conversion to the policy of Catholic Emancipation, his motives were special to the case and to his own feelings. ‘I was acting upon the impulse of private feelings rather than upon a dispassionate consideration of the constitutional relation between a representative and his constituents.’ The *Quarterly Review* of July, 1831, commenting upon the election of that year, pointed out that ‘*virtual representation* has been made a term of obloquy, and *direct representation* is, as every man sees, *mere delegation*’. It proceeds : ‘One word here, by the way, on this very constitutional doctrine, which maintains that representatives are sent to Parliament, not to exercise an independent judgement, but to speak the will, and obey the instructions of their constituents, and which, if pushed to the utmost, would obviously deprive Parliament altogether of the character of a deliberative assembly. . . . It has been held so far back as the reign of Elizabeth that each member of the House of Commons is deputed to serve, not only for his constituents, but for the whole kingdom ; and, consequently, that so far from being the mere organ of his constituents’ will, he is not at liberty even to consult their interests, except in so far as those are compatible with the interests of the rest of the community. . . . It is a principle, too, as clearly founded in right reason as any part of our ancient institutions.’ Why ?

The answer is : ‘For, to assert that the *will* of the constituent *ought to be* the *will* of the representative, is to assert (what is clearly an untenable proposition) that the constituent may fairly be presumed as competent to legislate for himself and the nation at large as the representative whom he deposes ; or, failing that presumption, that the wishes and caprices of the constituent ought to be gratified at the expense, not of his own interests only, but those of the country. No man, we suppose, will be forced to maintain gravely such palpable absurdities. Nor should we have thought the point altogether worth the space we have bestowed on it, but for its bearing on a practice which has of late been gaining ground very rapidly, of shackling the free judgement of members of Parliament in regard to particular measures by pledges demanded and given, either during an election or with a view to secure their return in the case of a dissolution ; a practice which we hold to be not only at utter variance with this constitutional principle, but one in every point of view of most pernicious influence and example.’

<sup>2</sup> Cf. Wallas, *Life of Francis Place* (Longmans), 1898, p. 326.

constituents at defiance for that period. It is, then, indispensably necessary that the conduct, as well private as public, of every candidate should be scrutinized, and the result made known, and that pledges should be given by him to the electors in the most solemn manner. . . . The pledges to be given by candidates should be as formal as possible. No man should be expected to attempt anything at such an unreasonable time as would subject him to the imputation of folly, no one should bind himself in such a way as would compel him to perform such acts to save his pledges as would make him a hypocrite; much must be left to the judgement of the representative . . .', etc., etc.<sup>1</sup>

The pledge became more and more acknowledged as a proper connexion between members and constituents and more widely given.<sup>2</sup> In the early days after Reform the Whigs were not for strict pledges, and even James Mill was less radical on this matter than one might expect from the *Essay on Government*.<sup>3</sup>

The last philosophical discussion upon parliamentary institutions written before the Reform Act of 1867 was John Stuart Mill's *Representative Government*, and Mill devotes a special chapter to the discussion of the question 'ought pledges to be required from members of Parliament?' The spirit of that chapter is as remote from that of our days as the Flood. And to answer why is to reveal the nature of the present political environment. Mill says that many members of parliament, even apart from the prospect of re-election, solely as a matter of conviction, allow their constituents the power of judging them. Are they right or wrong? Mill tries to answer the question by the application of two principles: that government must be responsible to the governed, and jointly therewith, that government shall acquire 'the benefits of superior intellect, trained by long meditation and spiritual discipline to that special task'. But how are the electors to decide which among a number of candidates can best give these benefits? Their judgement is unsound. Showiness rather than mind wins them, therefore they would be foolish not to exact a pledge. Nor can opinion be dismissed: Liberals ought not to vote for a competent Tory or Tories for a competent Liberal—the more competent, the worse for the constituents in such cases. Hence, again, pledges must be exacted, especially since in England the electors have no choice except between two or three rich people of a class superior to their own and certain to vote for measures in their own class-interests. 'This would not be needful under a political system which assured them an indefinite choice of honest and unprejudiced candidates.'

It seems, says Mill, impracticable to lay down for the elector any

<sup>1</sup> Then follows a list of subjects upon which pledges should be asked and given. The limits of the pledge are made fairly clearly—'no folly', that seems to mean no pledge when a theory is impossible or about which there is no information for a judgement; 'no hypocrisy', seems to mean, again, no pledge for the impossible or the unforeseeable.

<sup>2</sup> Jephson, *The Platform*, II, 145 ff.

<sup>3</sup> G. Lowes Dickinson, op. cit., p. 79.

political rule of duty. It depends on the general tone of the electors. Some look up to superior talent, some are distinctly without reverence. For the old politician, his record will guide the electors ; for the untried one, a pledge should be exacted. Even when the electors seek wisdom and attainments, their own personal opinion must not be suppressed ; but *apart from fundamentals*, they should allow the member his freedom.

‘ A man of conscience and known ability should insist on full freedom to act as his own judgement deems best ; and should not consent to serve on any other terms. But the electors are entitled to know how he means to act ; what opinions, on all things which concern his public duty, he intends should guide his conduct. If some of these are unacceptable to them, it is for him to satisfy them that he nevertheless deserves to be their representative ; and if they are wise, they will overlook, in favour of his general value, many and great differences between his opinions and their own.’

But, once more, a worrying thought :

‘ Whoever feels the amount of interest in the government of his country which befits a freeman, has some convictions on national affairs which are like his life-blood ; which the strength of his belief in their truth, together with the importance he attaches to them, forbid him to make a subject of compromise, or postpone to the judgement of any person, however greatly his superior. Such conceptions, when they exist in a people, or in any appreciable portion of one, are entitled to influence in virtue of their mere existence, and not solely in that of the probability of their being grounded in truth.’

Balancing these arguments, Mill concludes that no pledges should be required but that they must obtain a full knowledge of the candidate’s opinions and sentiments ; that they reject one who differs from them fundamentally ; that in proportion to their estimate of the candidate’s mental eminence they should allow him freedom beyond the fundamentals ; that they should be unremitting in their search for a candidate who can be trusted with the power of following his own judgement ; that they should consider it a duty to their fellow-countrymen to strive to place men of quality in the House ; that ability is better than greater agreement on many points, since the former is certain, but who is right or wrong is uncertain. But where the candidate is a member of another class a pledge is an unfortunate necessity.

**Conclusions.** What is missing from this analysis ? The factor which to-day is of the most importance : the Political Party. And almost the whole of the essay on *Representative Government* is stone-dead for the same reason, the omission of Political Parties.

It is clear that discussion after the rise of the caucus, must proceed upon entirely different lines, for the whole relationship of the elector to parliament has been altered. We have already displayed the nature of that alteration in the principal democracies of the world.



The parties have become recognizable entities secure of a large body of steady loyalty. These are the bodies which have applied themselves to the task Mill ascribes to the constituents : they search out qualities among men, and ascertain the value of policies. They make or endorse the nominations ; the caucus nominates on the basis of party membership and party programme ; the constituents expect the programme to be followed ; they expect the member to follow the instructions of the party Whip ; the party organization itself disciplines the member. If he does not vote with the party then he ceases to receive the Whip, or is expelled, or does not receive ' endorsement ', or does not receive aid in propaganda and funds—an important consideration.

The old-time discussion is, therefore, out of date. But its main considerations deserve recapitulation. The first was the need to overcome the gulf between the isolated elector or electors and the assembly of the representatives. Hence the strong emphasis upon freedom of the representative at a date when communications were so rudimentary that the locality could not learn the views of others without a personal meeting between all representatives. It was the representatives who thus insisted, because they realized, as any person with experience of deliberative assemblies does, that it is impossible (a) to foresee all the points which may arise and (b) to know what is for the good even of the locality until the other representatives have fully stated their case and (c) have revealed their emotional determination and social power of resistance. Identical considerations powerfully and almost unanimously moved the French Constituent Assembly, and essentially they remain true for our own day. Firstly, the question arose, was the nation a unity, or not ? If it were a unity then its meaning lay in the power of the majority to will for all, after due deliberation. This is the test of corporate sovereignty. Unity was desired ; therefore sovereignty lay with the whole nation, and not with any part. Hence, all the parts were subject to the will of the whole and could not prevail against the majority. The *intérêt général* dominated the *intérêt particulier*. The condition of unity was the condition laid down in debate : '*Il n'est pas permis de protester, de réserver ; c'est un attentat à la puissance de la majorité.*' This condition is recognized generally to-day. Secondly, enlightenment on the general will was impossible without *free* discussion. For to bind to instructions is to destroy deliberation. Opinion cannot be known in advance.

' When representatives from different parts of the country have to assemble and discuss in common objects which are as yet undetermined, which are neither foreseen nor known by the commissioners, it would be strange and absurd to shackle their wills by imperative mandates. Upon what could these absolute decisions be broken ? They would necessarily be incoherent and destructive of all harmony ; each district in occupying itself separately with different subjects, a general result on anything would not be reached.'

Every constituency must have the nation in mind when it is choosing its representative: the theory of democracy is indeed, says Siéyès, that each deputy is chosen 'in the name of the totality of constituencies; the deputy is of the entire nation'. Who can know the national will elsewhere than in a national assembly? We must propose, listen, discuss and modify our opinions, and, in common, form a common will; when people meet it is to deliberate, to know the opinions of others, to profit from each other's illumination, to confront particular wills, to modify, to conciliate them, and finally to obtain a common result by a majority vote.

These necessities are still with us; the need for national unity, and the psychological conditions of effective thought and deliberation. *But to-day the ideas must be applied not only, or principally, to local constituencies, but to industrial, commercial and cultural organizations which in reality form powerful and insistent constituencies.* The disruptive force of the eighteenth century was the province: the disruptive force of the twentieth is the corporate 'interest'. It is these interests which require reconciliation, and even a body founded upon representation of such interests—the German Economic Council—contains in its constitution the injunction which we find regarding members of Parliament—not to come bound to represent a special interest. The means has been provided by party organization based upon modern means of communication. Over the heads of the constituencies, territorial or functional, and in them, there goes on a never-ceasing discussion between party organizations. Before modern Parliaments meet, while they are in session, when they are in recess, even the only half-matured thoughts of the party leaders are disclosed, sometimes to their serious annoyance. These thoughts and plans are caught up by the Press, by party agents, by the public, by various interested associations; they are bandied about, ransacked for their present significance and their future application; they are answered and met with counter-retorts, and the bodies which do this work are equipped for it, better than any mid-nineteenth-century assembly. What then becomes of the constitutional clauses about mandates? They might be removed and no harm at all would follow; they cover up a patent fact. *The party gives a mandate to the member: he has his instructions from them: more, he carries them out.* As we shall presently see, even the speeches he may make, and other opportunities of activity in parliament, are settled by the party, ultimately on behalf of the constituencies, but immediately on behalf of the party itself. The imperative mandate was the constituencies' only safeguard in the days before party: and freedom was possible and desirable when the only means of meeting opponents was in the national assembly. Those days have gone. Party is the great intermediary.

However, though this is the general truth, there are certain differences which derive from the differences in party organization in various countries. In England we may say that the discipline of the party as expressed through the central and the local caucus is practically absolute. But the tradition of the members' freedom, the fair-sized remnants of local liberty, and popular deference to candidates, still assure the member who is capable of independent creativeness and of impressing the party, the opportunity of heterodoxy, provided he is capable of convincing the local caucus that he is right. This is important since the caucus is not merely a lifeless cog in the machine : it has sufficient independence to disturb the party leaders. However, the member who does not behave strictly as both local and central caucuses decide runs a grave risk. No clear rule exists as to when a member ought to resign : a change of party or repeated failure to support the party in the House would seem to be a certain ground for resignation, but practice on this has varied. The occasions are exceedingly rare and each, therefore, is of its own kind.<sup>1</sup> On the whole, there is bad feeling if the straying member does not resign : this has come to be considered as 'the thing to do'.

In the U.S.A. the power of the local mandate is consciously interwoven with that of the party. The practice of the British Constitution before 1832 required that the candidate should be a resident of the place for which he sought election, although the statutes providing for this were very old (8 Henry VI, c. 7 and 1 Henry V, c. 1) and evaded. This practice was put into the American Constitution in the fairly mild form that the member must be an inhabitant of the State in which he is chosen<sup>2</sup> ; and it still applies : moreover, it has been strongly reinforced by the statutory requirements of some states that the member must reside in the district which he represents, and convention supports the rule. This is based upon local patriotism of a rather predacious kind, and upon the general view that a member is a spokesman of local interests. The member is expected to further the special interests of the constituency in the matter of the 'pork barrel', that is, expenditure upon public utility improvements in his district, such as river and harbour works, post offices, and the public jobs for his district or state. Further, as we have already remarked, the queer remoteness of the American legislature from popular needs produced by constitutional prohibitions and the separation of powers makes the party less sensitive to public issues and it is, therefore, less insistent upon party discipline than the English parties.<sup>3</sup> The member is often

<sup>1</sup> Cf. the series of disturbances in the British Labour Party in the sessions of 1930 and 1931, caused by the secessions of several members connected with the New Party of Oswald Mosley, M.P. In almost every case the local labour party demanded their resignation. In practically none did the member resign.

<sup>2</sup> Art. I, Sect. 2.

<sup>3</sup> See note in Chapter 'A Closer View of Party', *supra*.

prepared to hold up the legislature for some local advantage : there are always other members who are ready to support him for reciprocal benefits : it is a custom well known, to be taken good-humouredly and exploited with gusto. Therefore the constituencies can expect profitable 'log-rolling' by their members : and the electoral bargain is more than implied. This causes the mandate to be double, the local-predacious and the party mandate ; and a member must bear both in mind ; in regard to the latter, he knows that owing to the congressional weakness of American parties he has more latitude than an English member ; in regard to the former, he lifts up his eyes unto the 'boss' of the State, frequently in the Senate, whence cometh his help.

In France the question plays a more considerable part than in England or the U.S.A., because there are few great party organizations to take the burden off the constituencies, and assume responsibility for parliamentary discipline. In 1871, Victor Hugo renamed the imperative mandate the *mandat contractuel*—'a contract between the mandate-member and the mandatories, creates between the elector and the elected the absolute identity of aim and principles'.<sup>1</sup> In 1881 a proposal was made in the Chamber of Deputies that the '*professions de foi*' of the members should be collected and reported upon, with the intention of showing the difference between the promises and the achievements of members and to cause pressure to be placed on the latter. The Commission in charge of the proposal rejected it, the reporter saying that the electoral committees could not be considered as the faithful expression of the views of the country, and that mandates may not be imperative since no one could foresee all questions which would arise in the course of four years. In 1894 a Socialist project sought to make an imperative mandate really imperative by giving the justice of the peace in the constituency the right to declare breach of mandate and annul the right to sit.<sup>2</sup> This ridiculous suggestion, natural to a party in a hopeless minority, was refused consideration. Duguit appreciates the fact that modern parties have eviscerated the legal clause, and he remarks that even though we consider electoral districts as a mechanical necessity and as having no specific character, yet they do play a part as the medium of expression of the electorate, and members are, in fact, rather closely bound to their constituencies.<sup>3</sup> Esmein, on the other hand, excessively formal, begins with the conception that representation is representation of the whole nation and concludes with the idea that there is no place for a mandate. History, which Esmein invokes, cannot in fact settle matters of this kind, but only contemporary facts.<sup>4</sup> The mandate

<sup>1</sup> Weill, *Les Élections Législatives*, p. 271. This in an address to various electoral committees who asked him to stand for the National Assembly.

<sup>2</sup> *Ibid.*, pp. 272, 273.

<sup>3</sup> *Op. cit.*, II, 504, 505, 510.

<sup>4</sup> Esmein, *Droit Constitutionnel*.

is, in fact, given by the party where the parties are strong, and where they are weak it is almost idle to talk of a mandate.

**Germany and the Effects of P.R.** Now German doctrines on the subject were of a remote, metaphysical nature before the War,<sup>1</sup> and devoted to the support of the constitutional clause which was borrowed from French Constitutions. Support was widely given to it because the whole system of government was unfree and the monarch was not anxious to assert popular power. After the war there was a significant change in theory, but the upshot in terms of written law was the same. At the very moment when this change occurred, proportional representation was established, a system of election in which tremendous constituencies are combined with the placing of all the candidates for each party on a single list, that list to be accepted or rejected in its entirety. In other words, the method of voting for a single representative among a number of individual competitors was abandoned. Who now is the mandatory? It is, in fact, nobody but the Party, and, indeed, the Party in its least personal and most abstract form. The full significance of this cannot be discussed at this point, but it is treated in detail later. But this must be emphasized: the moment there is a departure from small single-member constituencies the very question of an imperative mandate, of delegation or representation per member to a *constituency* becomes highly unreal. There is no longer any direct apportionment of a member or members to a determinate group. All the psychological conditions of that relationship are disturbed by the size of the constituency, the predominance of the party doctrine, and the composite personality of several groups of candidates, each seeking a composite victory in a conjoint campaign. More than elsewhere the party caucus is obliged to control the campaign, and the nominations; and it does so. The members are bound in the first place to the dictates of the party machines.

**The Size of the Electoral District.** We may take this opportunity of calling attention to the problem of the size of the electoral district, and of merely remarking here that it strongly affects the nature of the election campaign, and the psychological nature of representation. But this has not been treated so far, nor can it be treated at once, since it is more conveniently treated together with the problem of Proportional Representation. However, the reader must remember that this has to be reckoned with.<sup>2</sup>

**Delegate and Representative.** The conclusion, then, is this: that owing to the growth of party organization based upon modern

<sup>1</sup> Cf. Hatschek, *Parlamentsrecht*, and Laband, J, 356 ff. But Laband says (loc. cit., footnote 1): 'On the contrary there is a *political* responsibility which is demanded of the member of the Reichstag by caucuses, election committees, meetings, political clubs, the Press, etc. Such a demand cannot be legally enforced, neither is it legally denied.'

<sup>2</sup> See Chap. XXI, *infra*.

means of communication the old problem has taken on a new aspect. It is no longer the question, should a candidate hearken to his constituents, but how far he ought to obey the party. It is not in parliament that the individual, sectional, or group mandate is so important, but in the party councils, and it is there, indeed, that the relationship to the national interest is decided. There reconciliation takes place according to local urgency, the courage and talent of the members, and the ability and policy of the national leaders. But nowadays any local problem of importance which is capable of being settled by the party is looked upon as a national affair. As elsewhere in government, the distinction between local and national is being rapidly obliterated.

We have already shown that this has affected some party machines, which now go so far as to accept candidates only on condition they will resign if called upon to do so. There are obstinate defenders of this system; and we ourselves believe that it is unavoidable if parties are prepared to act so strictly. Its most serious danger is this, that it makes the party leaders tyrannical, and closes the door to any small revolt of membership, which may be a valuable struggle of renewal against dogma. It puts the party weight against the inventive new member or small minority. This disadvantage must be weighed against the disciplinary service of party which implements the keeping of faith with the electorate.

**Functional Associations.** Very rapidly in recent years, alongside the parties as mandatories have grown associations of citizens, often nation-wide in their purpose and membership. These are always active, and intercede with the Departments of State and with parliaments by personal conference and written communications. They operate in elections, in Parliament, upon Cabinet Ministers, upon the administrative departments. We have a good deal to say upon their significance later. Here it should be observed that their electoral business is the extraction of pledges from candidates at the time when these are most susceptible to influence. Deputations are sent to the candidate, but more frequently elaborate pledge-forms are sent to him for signature, and it is pointed out, more or less explicitly, that a block of votes in the constituency depends upon the answer.<sup>1</sup> Many members throw these in the wastepaper basket, but some are intimidated.<sup>2</sup> Most give a 'straddle' answer—that is, a specious answer

<sup>1</sup> Cf. activities of the Civil Service organizations in France, Trade Defence League (organ of the liquor interests in England), etc., etc.

<sup>2</sup> 'It is hereby agreed by the Headquarters of the Conservative, Labour and Liberal Parties that each shall send to all its respective Candidates a letter recommending them to refuse to answer all Questionnaires, received from outside the constituencies they are contesting, at the coming General Election, and also to decline to receive Deputations of persons other than electors in the particular constituencies which they are contesting . . .' (April, 1929). This agreement, together with the proposed letter, is reproduced in the *Report of the Labour Executive Committee, 1928-9* (pub. in the *Labour Party Annual Report, 1929*, p. 10).

which will swing the votes without committing the candidate. So in all democratic countries, but in the U.S.A. the practice has gone further than elsewhere. There are more 'groups' formed, especially by leisured ladies and reverend gentlemen, and more money available for printing. On the democratic assumption, associations are quite right in asking for pledges, and members must expect to rebuff them at their peril. For, however responsive and capable the party system may be even where it is best organized, it is good that it should be stimulated from outside—as it usually is—by groups which feel passionately about some particular public affair. It would be highly dangerous to representative government to allow the parties a monopoly of political thought, for they—the party leaders and organizers—like all guilds, tend to be content with the minimum of thought that will obtain power, and when in office they have literally no time for thought at all. As the frank will admit, they begin to act not on information, but on instinct. This is quicker and less troublesome. We shall show, further, how the party organizations are less the inventors than the brokers of policy, and that without independent philosophers and critics they would be wellnigh sterile.

**The Multiplicity and Confusion of Issues.** One final point: parliaments are about to begin their work; the parties have accomplished theirs and have given pledges to the country. What is the meaning of those pledges? The parties carry a large basketful of projects. These are the things by which rational men would judge their worth in terms of votes. But owing to the desire for victory they parade these commodities not conscientiously, for experience of the electorate's mind shows that victory cannot thus be won. An issue embodied in a slogan is raised as the main object of the electoral struggle. One, two, perhaps three issues of relatively greater immediate importance than the rest are made the subject of contention. This procedure results in two things—first, the disbelief of large numbers of people in the whole electoral process, and secondly, a heated discussion immediately after an election about what the voting really means, a discussion which may become particularly acrid and even grave, when new problems arise and are dealt with by the government issuing from the election.

This is an unfortunate fact, and there is a good deal which the rationally-minded may say against the practice of singling out issues for prominence and keeping others in the background. A mandate is incurred in respect of one thing, or several things. Groups otherwise heterogeneous are brought into the same camp, and afterwards some may feel cheated. Neither the Government nor the people know exactly what they have done or engaged themselves to do. But the answer to this is, if not entirely satisfactory, at least somewhat reassuring. The general attitude of mind of the party and the character

of its leaders are evoked in the course of discussing the special issues, and electors may be as much impressed by this as by the merits of the specific proposals. Secondly, the conduct of parties cannot be raised far above the level of the general mass of the electorate, and until that is improved chicanery is bound to prevail. In fact, in England, at least, the best of slogans, and the most alluring of issues, are deprived of effect by the general though vague knowledge of party history and personalities. As to new problems raised in parliament, this is an inevitable occurrence wherever parliaments last more than a few minutes, and the safeguard is complex: a reduction of their term, a party system with sensitive electoral antennæ, a permanent party organization with its eye on the next elections, a system of by-elections; while in many places the referendum and the initiative have not only been widely advocated, but adopted. It is also a good argument for devolution to local authorities, and federal systems, that the more authorities which participate in public affairs, the less is a confused complex of problems unloaded upon a single electorate at one stroke. It must be admitted that the mandate is confused, and partly warrants the many letters written by unemployed clubmen to the leading newspapers after each election. It will appear as we go on that the evils can be and are mitigated by a good party system.

**The General Nature of Membership.** Whether the mandate comes from the constituency, an association, or the party, its exercise requires the member to think, discuss, and determine, the last being expressed by his vote. We shall see that in modern parliaments everywhere the large majority of members do little more than vote, that only a few discuss, and a very small minority think. The composition of these functions varies a little from country to country, but generally the emphasis is upon will, or power, that is, upon the vote. This is a direct corollary of the majority principle; and it seems a parlous condition, until we reflect that, after all, the real thought has already been accomplished outside parliament and will yet be accomplished, completed and applied to all points of practical detail by the permanent officials. Fundamentally, a parliament is a forum where men may measure the strength of each other's will as expressed in their numbers and other demonstrations of strength of purpose, and either enter into agreements by mutual concessions, or vote each other down.

Our survey of political parties gave this result: that broadly, policies are made or adopted by them. This does not mean that the members of a party or its leaders are inventive, that they conceive and elaborate schemes of reform or conservation. They are certainly disposed to do this by character and the stimulus of their experience. Some, indeed, do discover the answer to problems and the means of



fulfilment. Upon reflection, however, it will be seen that not many such inventions are due to party and parliamentary persons. The politician is a broker rather than an inventor, and not infrequently must be vigorously threatened before he satisfies his clients. Those who discover issues, and explore and plan the means of their settlement, are the thoughtful and sensitive among the population, though they may be and in our own day usually are voluntarily attached to some particular party. The great industrial and commercial associations, the social groups of all sorts with which every country now teems, the municipalities and their associations, reformers and philosophers like Judge Lindsey, Henry George, Bernard Shaw, the Webbs, Lassalle, Hirsch and Dunker, Raffeisen, Plimsoll, the Prohibitionists, the Bimetallists, Adam Smith, Rignano, Tolstoy, Marx, Marie Stopes, and others, first pursued lonely paths and were later joined by disciples who surged forward to harass, press and sometimes to convince political parties—these are the true manufacturers of the politicians' stock-in-trade. This is quite natural, for to govern well has always required a rare degree of knowledge and wisdom.

The application of this truth to our own day is especially important. Populations are vast, the division of function, economic and social, minute and complex, and its consequences, whether intended or unintended, incomprehensible without long and patient study, while each entity has its own peculiar nature distinguishing it from all others and from human nature in the abstract; and abroad, in places so distant that the average person cannot even conceive that a full all-round life is lived there, are woven connexions which will be beneficial or destructive in proportion as we learn to read the secrets of their mastery. The scale is so stupendous, the detail is so minute and manifold, the interests so special, the studies of the technicians so microscopic, that only the comprehensive mind, the patient, deep insight of the genius, and the vivid feeling of the fanatic, can master and reproduce their meaning for the purposes of philosophy or governmental control. Nor is that all. If States were, indeed, static, and humanity ceased to spin problems involved in the attempt to control the future, the larger half of the difficulty of government would be removed. Area and complexity can be mastered in proportion as they remain unchanged, but since the Idea of Progress advanced to the centre of civilized aspirations, the whole of Futurity has become a building-site, and the philosopher is needed to prophesy not only the important events and conjunctures of a year's time, but those of a decade and even a century hence. The actual rapidity of change in the mechanical basis of our civilization, and in fashions in thought, the swift increase of population in the nineteenth and early twentieth centuries, have encouraged this pioneering, which has ceased to be of the dream-like

order of the old writers of Utopias, and has become the hard, directed foresight of people like H. G. Wells.<sup>1</sup>

The world of special groups, philosophy and social speculation, then, furnishes the politician with his material ; and we must not forget that in that world the politician has his own salaried professional philosophers and contrivers—the Civil Service, which not only thinks and plans but explores and formulates what the rest of the world is thinking and planning ; it is a professional machine to acquire, to assimilate, to cut and dry the world's intellectual and emotional produce, and put it up in the form which politicians may understand and employ.

**Politicians not Philosophers.** The politician is not chosen for his knowledge, nor always for his character. He is chosen because he represents the views of a certain party, and because he can win the seat (and this implies, quite naturally, that talented men without campaigning qualifications, kinetic, pachydermatic, confidence winning, are not chosen as candidates). In other words, the policy has been made before he becomes a member ; the party has already tapped the real sources of policy, and he becomes its representative. The only exceptions to this generalization are that, firstly, the party may be weak, when the politician, being less dependent, may himself compose or gather ideas ; or secondly, where the party, being strong, the politician happens to be a person of abnormally creative mind. There are countries in which the party is weak, doctrinally or disciplinarily, or both. In France discipline is weak and the deputy has a free field to create or market policies. No one, however, will say that he creates, though he surmises and expatiates ; and the reasons will be apparent as soon as we shall have analysed the personal composition of the Chambers. In the U.S.A. doctrine is weak : but were Congressmen never so intelligent, there are almost insurmountable obstacles to the creation or advocacy of political projects.

Indeed, it is not the intention of the people or the parties to get philosophers elected : the object is Number, the modern political medium of Power. The member is a vehicle of the party, and the party is chosen because, fundamentally, it embodies the material and spiritual interests of the people who choose, and it is chosen to dominate the State, *as far as it can*, in the sense of its avowed and explained policy.

*As far as it can ! In that phrase resides the virtue of Parliaments and Politicians !* For in spite of the extra-parliamentary activities, of the parties, their researches, their considered formulations of policy, their cross-country debates, and the incessant war in the Press, the policy of each party is not complete and cannot be complete until the

<sup>1</sup> When I once ventured to congratulate Mr. Wells on the success of his *Anticipations*, he answered : 'That was easy. I merely had to project certain lines which were already visible. But now I have to go further ; to find what is latent and then build upon that for an even remoter time.'

other side is heard. When members enter Parliament, were they conscious of anything but their electoral victories, and the messianic programmes of their 'side', and the chances of reform and distinction, they would solemnly admit (1) that much in their programme was tactical, included to 'catch votes', (2) that a good deal in heaven and earth had not been thought about at all, and (3) that they must expect the unexpected : events, contingencies, calling for quick thought and the improvisation of a policy. They would realize, upon a little reflection, that even when the policy was not tactical, but had been considered in all its facets with care, and with a calculation of their opponents' strength, not all could be foreseen, not every detail sifted, not every force truly evaluated until it had been discussed with hostile elements possessing the power to enforce some at least of the drive of their hostility. Not until there is a personal confrontation in a small assembly, with systematic procedure, can the detailed expression of policy, which means everything, be considered, nor the full spiritual force of majority and minority be measured and applied. Further, the good in dialectic is not only that it causes one person or party to triumph over another, but that it causes truth to triumph over both, by provoking the explanation of self to self. The close confrontation of members and parties dispels the mists of blindly generated enthusiasm, produces sobriety and self-questioning.

Therefore parliaments and politicians still have their place in the modern state, and deliberations and debate still occupy a central place in their functions. The forms are mainly those of the age before rapid transport, fast communications, and party organization ; they take little account of these and thus provide for ample debate, as though there had been no preparatory and even decisive stages in the country already ; as though Parliament were the creator, not the creature, of discussion. We shall see that there is much that is antiquated, wasteful and dead in parliamentary procedure and forms. But the remarkable thing is that the minority is still allowed some opportunity of influencing the laws and administration—rightly, in our opinion ; and, cleverly led, it can convert this opportunity into power.

\* \* \* \* \*

**The Politician is a Broker.** The politician is, therefore, as near as any single term can signify him, a broker. His business is to apply the power resident in his constituency to convert desires into statutes and administrative action by alloying them with the possible. He attempts to get as near the desirable as he can, and what is possible he will learn, whether he is in the government or the opposition. The ways are many and devious. But let us attempt to paint a portrait in broad outline of the best type of member. The portrait will do for all parliaments. And we sketch, not the art of succeeding to high place or of obtaining favours—that will appear

as we proceed—but simply the equipment of the member to convert his mandate (poor, poor word !) into governmental realities.

He need not be a scholar, and indeed, this would rather entangle and embarrass than help him, for his function is to act, to fight, and seize advantages, not to meditate upon them. Were he a scholar, an expert, he would be encumbered by doubts and details, and it is notable that scholars who have entered parliaments have either been silent or silenced.<sup>1</sup> Think of John Stuart Mill or De Tocqueville. Or they have had to jettison their scholarship and become men of affairs, carrying the least baggage, and allowing full passion to vanquish their scruples. The member of Parliament has no need to be a scholar, for he can get all the information he needs for debate in a desiccated preparation from the party pamphlets and the newspapers. Further, if he has the energy of reform, or the desire to shine in Parliament and the constituencies, in a sufficient degree, the government printing offices turn out a spate of reports made by official experts and investigating committees. Only the few more serious members make any pretence of trying to master these, for again the party and the Press offer short versions, though it has been recounted by a witty member of the French parliament, if I understand him rightly, that a member has been known to sleep on the reports in a literal sense, owing to poverty so great that he could not afford a bed !<sup>2</sup>

Truth compels me to say that at least one-half the members are unable to master the meaning of a lengthy and complicated report by their own efforts, owing to insufficient native ability and education ; but of course they are able to read. A few, however, are able to understand the complex and technical information. These and others who are less fortunate may have friends who are experts : and then successful intervention in debate may be assured by persistent and acute inter-

<sup>1</sup> Cf. Hazlitt, Essay on *Sir James Mackintosh* : 'He spoke the truth, the whole truth, and nothing but the truth ; but the House of Commons (we dare aver it) is not the place where the truth, the whole truth and nothing but the truth can be spoken with safety or with advantage. The judgement of the House is not a balance to weigh scruples and reasons to the turn of a fraction : another element, besides the love of truth, enters into the composition of their decisions, the reaction of which must be calculated upon and guarded against. If our philosophical statesman had to open the case before a class of tyros or a circle of greybeards, who wished to form and strengthen their judgements upon fair and rational grounds, nothing could be more satisfactory, more luminous, more able or more decisive than the view taken of it by Sir James Mackintosh. But the House of Commons, as a collective body, have not the docility of youth, the calm wisdom of age, and often only want an excuse to do wrong, or to adhere to what they have already determined upon ; and Sir James, in detailing the inexhaustible stores of his memory and reading, in unfolding the wide range of his theory and practice, in laying down the rules and the exceptions, in insisting upon the advantages and the objections with equal explicitness, would be sure to let something drop that a dexterous and watchful adversary would easily pick up and turn against him, if this were found necessary ; or if with so many *pros* and *cons*, doubts and difficulties, dilemmas and alternatives thrown into it, the scale, with its natural bias to interest and power, did not already fly up and touch the beam. . . .'

<sup>2</sup> Delafosse, *op. cit.*

rogation, so that the most abstruse points are cleared up. Indeed, this is a very important part of the work of an able member—to discover the experts and philosophers and get himself coached by them, which he may easily do if he is a little energetic, for such people are usually good-natured and easily succumb to the flattery that they and their knowledge are of practical importance, and the belief that in this way they become the real sources of government, that ‘philosophers are kings’. Nor are the hopes of these expert friends vain, but they are imperfectly realized owing to practical exigencies, or, in other words, the confounded obstinacy of other people, and to the fact that the advice of rival experts and philosophers has been taken by the other side.

The member who has gone so far has gone very far, and it now behoves him to keep friendly with other members. Popularity on personal grounds is exceedingly important, for it takes the edge off sharp truths and opens a way for their acceptance. It is even more important to be popular with opponents than with friends, for they will grant concessions on that account, believing that such ‘a jolly fellow’ could hardly be ill-willed or stupid: or at least the concession is granted before they come upon these truths, by which time they have lost the battle. Hence, the Lobbies, the social life of the Parliament; *la buvette* and the political clubs, play a large part in the evolution of the member and of policies. The full list of ingredients for success in this direction, universally valid, cannot be given—each person is born with his own way to the hearts of other people. Yet to smile perpetually, tolerantly and graciously, never to commit yourself to anything definite, and to do little social favours, are three very obvious among the rest. The need to do social favours involves an incessant vigilance for friends who have social graces and power. Their value must be justly estimated—that is, their value in the political exchange—and they must be held in corresponding regard, and offered corresponding respect and political favours. Friends must be made and dropped in accordance with this rule. If you wish to waste time on useless people you may do it, of course, but it should be recognized as a waste of time. Here, in the activity of the politician, as everywhere in life, the function has its own nature, and its commands are peremptory. On the political exchange men and things are valued in terms of the desirable power which can be purchased with them: quite properly, for victory must not be jeopardized by giving way to a desire to gaze at the stars.

What is all this but to accumulate knowledge of issues, to understand human strength and weakness, to weave personal friendships, and to concentrate and employ them for a special purpose: the conversion of wishes into government? And this can be achieved with more prospects of success if the member is sedulous in his attendance at

committees. This is doubly important, for it is in small gatherings that men learn to know each other, it is in these gatherings that important decisions are taken, it is by constant attendance that men acquire the appearance of an indispensable institution, and, moreover, it is here that more than the mathematical share of power can be obtained, for attendance is usually slack. To be in permanent session is to become an oracle, and to exercise more than the share of power corresponding to one's personal capacity. In France, Germany and the U.S.A. this is more important than attendance and debate in the full assembly, for the principal part of legislative and administrative work is done in Committee, the member who is elected chairman or reporter being presented with a great opportunity.

To the qualities already described, another is indispensable. It is a knowledge of the rules of parliamentary procedure. There the member will find all the permissions and prohibitions affecting his right to intervene in discussion. He will discover weapons to defeat his rivals and opportunities to advance his own cause, obstacles to his progress, and roads which will require a process of sapping. By adroit use of these rules he may exact concessions by threatening to obstruct his opponents' path with amendments ; and in modern parliaments so much has to be done at the insistent call of the constituencies that men are willing to concede in order to proceed. He will also be able to obtain concessions by the intrinsic merits of his argument, his rhetoric, and these together will stem the tide of his opponents' policy by exhibiting to them its results, as the mere technical consequences which they have not had sufficient imagination to foresee, and as the extent of human opposition which will be aroused and which has been underestimated ; and, further, by a portrayal of results in terms of votes at the next election.

Where the party is in opposition the member's activity is favoured by the leaders and it may bring him reputation and power. For then any stick is a good weapon ; and the Government must be unmercifully harassed. But when the party is in office then the private member is sworn to cheer and vote, and not to oppose. Even a trifle is a waste of time, and may wreck the strategy resolved upon by the leaders. The party has many means of enforcing this unwritten rule ; the principal method being to set officers to watch the conduct of the member, or to meet together in Parliament and discuss and determine their course, and to threaten the refractory with expulsion or the withdrawal of aid at the next elections. The discipline is effective, for, as we have seen, without the party there is no nomination, and no opportunity to play an effective part in Parliament, and the expenses of election are so great that most members must rely upon party help.

Thus it is an illusion, and a quite unnecessary one, to believe that

members of Parliament are creators of policy. They are parts of an embattled host whose objective and strategy have long since been prepared, and who are needed for the purposes of minor tactics, which are not, however, without importance. Or to change the metaphor—they are merchants buying votes in the cheapest market, the constituencies, and selling in the dearest, to the forces opposed to them, which is always the official opposition and often their own colleagues and leaders. It is not derogatory to the function and dignity of parliaments to say this; for we merely say that not in the members do the initiative and the need for thought reside, but in the party leaders. The work of Parliament is important, but the ordinary member cannot, does not, and need not, contribute much to its execution, and that the average member was ever in a much, if any, better position, in a parliamentary 'Golden Age', is a legend, not history. Where, indeed, as in France, the private member has much independence and the parties are of small authority, no business is done, and the work of parliament dissolves into an interminable series of oratorical skirmishes with guerilla tactics, and destructive ambushes.

This does not mean that the quality of a parliament's work is independent of the ability and work of its members. We have seen by what methods and for what ends the member may become effective. But we are concerned to say that almost everything depends upon the leaders, and that is due to electioneering methods in large populations with universal suffrage, the complex technical nature of modern civilization, and the large amount of business which parliaments must get through. However, the better the followers the better (though the more embarrassed) the leaders.

On the whole, then, in a country with reputable parties, the constituencies do not cause much damage in returning mediocrities, but where such parties do not exist—as in France and the U.S.A.—their choice may be, and is, disastrous not only to their civilization but to the very notion of parliamentary government. Even this evil is partially overcome by that disbelief in the logical extreme of democracy which shows itself in the establishment of permanent professional administrative officers. Now, if we examine the composition of parliaments we shall see that no member is, in fact, likely to be expert in more than one subject of a rather narrow scope, and though all members taken together do have knowledge of most national and international interests, yet there is no distribution of members in arithmetical proportion to those interests. The correspondence between members and the aspects of national life upon which they are expert varies in different countries as Table I shows.

The outstanding features of this Table are : (1) the small proportion of those who can, by the major occupation of their life, be expected to have a comprehensive opinion and make a useful contribution to general

TABLE I  
ANALYSIS OF PROFESSIONS OF PARLIAMENTARIANS AND OF THE NATION—1924

Professions and Occupations	U.K. and N. Ireland			France			Germany			United States		
	House of Commons	% Total	% Occupied Population	Chamber of Deputies	% Total	% Occupied Population	Reichstag	% Total	% Occupied Population	House of Representatives	% Total	% Occupied Population
Agriculture—Land-owners, etc.	26	4.2	9.1	83	14.3	53	17.2	43.4	59	11.9	24	5.6
Agriculture—Labourers	—	—	—	1	0.1	—	—	—	—	—	2	0.4
Industry, Commerce and Finance	157	25.6	71.0	80	14.6	40	12.7	46.0	50	10.1	78	17.9
Industrial Workers	11	1.8	—	57	9.6	8	2.5	—	39†	7.1	—	—
Army	39	6.3	—	11	1.9	6	1.9	1.8	40	8.0	—	—
Air	5	0.8	0.6	—	—	—	—	—	23†	4.7	—	—
Navy	13	2.1	0.5	6	1.0	1	0.3	0.2	—	—	—	—
Civil Service	3	0.4	2.9	43	7.3	22	7.1	3.3	57§	11.5	—	—
Law	128	20.8	0.1	160	27.3	84	26.7	0.2	18	3.7	257	59.3
Medicine	13	2.1	1.0	41	7.0	37	11.5	0.8	4	0.8	5	1.1
Teaching	17	2.8	2.2	46	7.9	19	6.1	1.3	42*	8.5	16	3.6
Clergy	5	0.8	0.3	7	1.0	1	0.3	0.4	7	1.4	4	0.9
Authors, Journalists, etc.	25	4.1	—	38	6.5	26	8.3	—	60	12.2	16	3.6
Other Professions	16	2.6	1.0	3	0.5	4	1.3	0.3	—	—	11	2.6
Party Officials	16	2.6	—	—	—	—	—	—	33	6.7	—	—
Trade Union Officials	87	14.2	—	—	—	—	—	—	56	11.4	—	—
Unspecified	54	8.8	—	8	1.0	13	4.1	—	53	—	22	5.0
Other Employments	—	—	11.3	—	—	—	—	2.3	5	1.0	—	—
Total	615	100	100	584	100	314	100	100	493	100	435	100

† High salaried employees.

‡ Including former Civil servants.

§ 35 Civil Servants, 15 Judicial Servants, 7 Local Officials.

\* Includes University professors.

Sources: Census U.K., 1921. N. Ireland, 1926, were unavoidably combined. France, 1921. Germany, figures for 1924, from Kamm, Abgeordnetenberichte und Parlament, Berlin, 1927, p. 11. U.S.A., 1920.

Notes—(1) Trade Union Officials. Figures were not obtainable for other Parliaments. (2) Percentages for the whole country are approximate. (3) Other Employments largely domestic and personal service.



policy : hence, on each particular policy a large proportion of the assembly is bound to be silent and take things on trust ; (2) that there is a spokesman for almost every aspect of national life ; (3) the large number of teachers who find their way into parliament ; (4) the large number of professional politicians (authors, journalists, party officials, trade union officials, 'other professions', and 'law'). These, in fact, usually have the best *all round* knowledge, but the knowledge is frequently superficial. The large number of 'lawyers' is due to two facts, that so many men who have taken the qualifying examinations for the legal profession are incapable of earning a living in it, and therefore drift into the profession where a living can be picked up and prestige won—politics, and secondly because there is a tradition that the man who knows the law can make the law.

**The Duration of Parliaments.** We saw that those who desire a strict correspondence between Parliament and the will of the people believe that representativeness is to be produced by the frequency of parliaments, or, put in another way, by their short duration. What particular reasons have swayed men in their settlement of this question, and what should determine our judgement to-day ? In the U.S.A. the strength of democratic enthusiasm at once caused the new states to fly to such extremes as half-yearly and yearly elections,<sup>1</sup> and both John Adams and the author of the *Federalist* tell us that there was a current maxim running, 'where annual elections end, tyranny begins'.<sup>2</sup> The Constitutions explained themselves : that of Massachusetts, for example, saying, 'in order to prevent those who be vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life'. The first urge was to ward off tyranny ; the claims of efficiency were naturally ignored. The Federal Constitution seems to have adopted a biennial term for the House of Representatives with little or no debate, but the *Federalist* supplies a sound set of arguments for two years rather than one, and, we might say, for a longer period than two, though it was speaking to the more limited brief.

'As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the policy by which the dependence and sympathy can be effectually secured. But what degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation, and must depend upon a variety of circumstances with which it may be connected.'

What were the circumstances, as the *Federalist* saw them ? There was less need to control the House since it was to be checked by the

<sup>1</sup> Connecticut and Rhode Island were half-yearly, and the rest, save South Carolina (2 years), annual.

<sup>2</sup> *Federalist*, p. 272 ; Merriam, op. cit., p. 78. Cf. also the various Declarations of Rights in the State Constitutions.

Constitution itself, by the State legislatures, and by the other federal organs. 'It is a received and well-founded maxim, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and, conversely, the smaller the power the more safely may its duration be protracted.' Secondly, 'No man can be a competent legislator who does not add to an upright intention and sound judgement a certain degree of knowledge of the subjects in which he is to legislate.' Thirdly, attainment of this was possible only by actual experience in the station that requires the use of it. To settle the question, then, broadly, the *Federalist* asked the question, 'Does the period of two years bear no greater proportion to the knowledge requisite for federal legislation than one year does to the knowledge requisite for state legislation?' The *Federalist* answered that the field of Federal jurisdiction required a knowledge beyond that needed for the government of a single state. The condition of the States was diversified; the legislation of foreign trade demanded an acquaintance with the ports, usages and regulations of the different states; taxation required a wide knowledge of internal conditions. So, too, regarding the regulation of the militia and foreign affairs.

'Some portion of this knowledge may, no doubt, be acquired in a man's closet; but some of it also can only be derived from the public services of information; and all of it will be acquired to best effect by a practical attention to the subject during the period of actual service in the legislature.

These, then, were the main grounds for a term longer than one year; time for business, and the need of expertness. The French National Assembly<sup>1</sup> argued, generally, as the *Federalist*, and added the argument that a long duration was necessary to avoid the technical inconveniences of dissolution and re-election.<sup>2</sup> But short duration commended itself to them, also, as *a means of overcoming the expression of transient feeling at any one election.*

The struggle has, indeed, always been between a shortness of term, to bring pressure upon a monarch, or to prevent the parliamentary body from becoming a corporation closed to the popular will, and the necessities of parliamentary technique. The English Act of 1641 calling for a parliament at least every three years 'for the preventing

<sup>1</sup> Cf. *Archives Parlementaires*, VIII, 573 (Dupont de Nemours): 'This term (three years) appears to me to be too long. It may even be disastrous to the nation. Men vested with the legislative power for three years may let themselves be carried away by the impulse to dominate, so natural to the human heart.' And Pétion de Ville-neuve, loc. cit., p. 533: 'The best means of maintaining the wisdom of the assembly, is by often renewing the members, and by holding them incessantly under the observation of their constituents, by the publicity of their operations. It is to prevent their ever being able to hope to traffic the public liberties with the Government, and to give, above all, to the primary bodies the right, in subsequent sessions, in case of prevarication, to make the most emphatic and imperative demands.'

<sup>2</sup> Op. cit., p. 585.

of inconveniences happening by the long intermission of parliaments', was designed to intimidate the king by its simple presence. Then in 1716,<sup>1</sup> the Whig majority taking advantage of disorders following the Jacobite rebellion, lengthened the duration of Parliament to seven years by the Septennial Act: this would avoid troublesome campaigns, 'remove expenses', and disaffection. The arguments against this Bill naturally pointed to the unrepresentative character of any house based upon such long tenure. The Bill was naturally supported by all the placemen.<sup>2</sup> The Septennial Act was not repealed until 1911, when the Parliament Act was thought to have so weakened the power of the House of Lords that more frequent appeals to the people were deemed necessary.

During its two centuries of life the Septennial Act was frequently challenged on the grounds that it severed Parliament from the electorate<sup>3</sup>; but its effect, in practice, was mitigated by dissolutions caused by events which made an appeal to the people expedient or genuinely important. Mill was not an opponent of the septennial period. His view was that the period should be short in order to keep the representative close to the people, and that wherever democracy was weak in the Constitution even a three-yearly period was too much; but, on the other hand, where democracy was in the ascendant, the Press active, and where it was important to prevent 'timid subserviency' in the member and allow him a long period by which to be judged, then five years was not excessive. In England, indeed, seven years was not too long, especially considering the possibility of dissolutions.

On the advent of the Parliament Act, the period of tenure had necessarily to be reduced. For, in accordance with the maxim of the *Federalist*, the greater the power of the House the greater the need for its control, and the reform of the House of Lords certainly made the House of Commons the most powerful legislative body in the world. The idea that a slight majority—a transient majority—could override a large minority in matters fundamental naturally caused a search for safeguards. The referendum was proposed and rejected: the only thing that remained was a reduction of the term of Parliament, or, in other words, the greater frequency of necessary electoral appeals lest members 'outstay their mandates'. This was fought by some among the Conservative Opposition on the grounds

<sup>1</sup> In 1689 the introduction of an annual Mutiny Act and the granting of annual supplies, added to the triennial frequency of parliaments the necessity of their annual session. The Act of 1694 positively provided for the discontinuance of any parliament after three years of life, and the motives at work in the passage of this Act were the House of Lords' jealousy of the Commons and Whig desire to shackle the Crown. Cf. J. G. Randall, *The Frequency and Duration of Parliaments*, *Am. Pol. Sc. Review* (1916), X, 665.

<sup>2</sup> Veitch, *op. cit.*

<sup>3</sup> Cf. William Lovett, *Life of William Lovett*; Buckle, *Life of Disraeli*, I, 283.

that more frequent elections would increase the power of the party machine and further depress the already depressed condition of the private member; increase the power of the Cabinet because it decreased the power of the ordinary member, and raise the expenses of a parliamentary career. The arguments on the Liberal side were as irresistible as the numbers. Now the Parliament Act contains a clause, inserted upon pressure by Conservative peers, to the effect that the period of five years should never be lengthened by the exclusive action of Commons and King. It is easy to see that if any Parliament extended the term, the power, the 'suspensive veto' left to the Lords, would be almost entirely swept away because in order to suspend effectively, the opportunities of the House of Commons to propose laws must be restricted to a short term. Lengthen its term and the pressure ceases. The question now, however, is, whether the period ought not to be less than five years?

France has a period of four years with, *conventionally*, no power of dissolution in the hands of the government. Germany very deliberately gave herself a period of four years,<sup>1</sup> with a right of dissolution which has been several times exercised. What is there to be said for this period rather than three years or five years? It is clear that frequency of appearance before the electorate is essential: not so much that the members be judged, but in order to exercise a pressure upon the party. The stronger the parties, in fact, and the weaker the individual member, the more necessary is it that the leaders be shaken in their convictions and out of their dogmatic self-satisfaction by an electoral shock. We have already spoken of the growth of a guild consciousness in the group at the head of each party, and the intensive research of Michels bears out the common observation that the leaders tend to become oligarchs remote, not only from their constituents, but also from their parliamentary following. The nearer the election the more carefully they scan their own consciences and the movements of opinion in the constituencies. This was most strongly urged by the Independent Socialist Party of Germany during debates in the Constituent Assembly of 1919, and they were therefore in favour of a biennial term. Preusz and the Social Democratic Party had suggested three years.<sup>2</sup> Preusz refused to accept the proposal of a term of two years on the grounds that the shorter the period, the less favourable for Parliament, since it is *weakened* as against the electorate, and as against the Cabinet. On the other hand, a large minority of the Assembly were in favour of quinquennial parliaments. It was

<sup>1</sup> Const., Art. 23: 'The Reichstag is elected for four years.' Similarly the Prussian Landtag, Prussian Const., Art. 13. The old Constitution (Art. 24) established a term of three years until 1888, when a law extended the term to five years. The law of 1888 was passed in order to avoid too frequent appeals to the people. Originally three years had been included in the Constitution by the Reichstag instead of the four years proposed by Bismarck.

<sup>2</sup> Preusz, *Begründ.* 1, 11 to Project I.

remarked that a short period is incompatible with steady and good work and that, in default of this, parliament must lose prestige. We think this argument sound. It was also rightly observed that a good deal of time is lost at the beginning and the end of each parliament: novices take time to find their stride; while, at the end of the term, deputies and parties are already busy with electoral plans and their thoughts are elsewhere. The longer the period the shorter the proportion of time lost in this way. Further, it was necessary to avoid frequent excitement of the electorate. This argument is good only when it is measured: how frequently will excitement have a bad effect? No one can say this, and in fact elections are not so exciting and impassioned as is pretended.<sup>1</sup> It is suggested, too, that the more elections the greater the popular apathy and the smaller the number who vote. Again, this is an unmeasured argument: and between four years and five years we venture to believe that there is no difference in this regard at all.

But there are weightier grounds for a long period. If the *Federalist* could, in its time, stress the importance of the need for information in the function of government, that importance is surely even more critical to-day. The world is no longer to be governed by a gentlemanly acquaintance with Rousseau, Burke and Adam Smith, and a dash of classical quotation, although there are many members of Parliament who would be improved by even such an accomplishment. Even the small amount of control which remains to the private member, and the not very large amount of real government which is left to the party, is not to be effectuated without far more knowledge of principle and detail than was needed by a Congressman of 1800. As a member of the German Constituent Assembly pointed out, parliaments are called upon not only to talk but to *administer*, and this requires *intensive* knowledge attainable only in time through the actual conduct of affairs. All this serves to emphasize the necessity for time for apprenticeship and actual labour. Nor is that all. The proceedings of all parliaments are confined in intricate forms whose value we shall analyse later. They are not to be learnt quickly, yet not to know them renders null the most carefully prepared contribution to parliamentary discussion. Nor can procedure be learnt from written codes; quite as important and commanding are the usages and customs of parliament—which can be learnt only by long presence and adaptation. Neither can we entirely ignore an argument put in the Prussian Constituent Assembly for the lengthening of the term: viz., that frequent elections are a strain upon the party funds, and might make the

<sup>1</sup> This argument is most usually put, as it was upon this occasion, by those who hold the Conservative view of the state. Heilfron, op. cit., p. 3104 ff.

party officials more amenable to influence by contributions from 'interests'.<sup>1</sup>

Thus a compromise must be made. For England I think three years is too short for the necessary novitiate and *expertise*, and five years too long. The French and German rule<sup>2</sup> of four years might with advantage be adopted: for neither written constitution nor Second Chamber checks the power of the House, and the referendum has been rejected. Other countries have other problems: Germany, for example, has no by-elections in her system of proportional representation, and therefore lacks that impressive electoral weather-vane<sup>3</sup> which is still of such intense interest in Great Britain.

There is one other argument for a reduction of the electoral period; it applies to all countries, and therefore to England. But so far we have not met it in any legislature. It is this. Since the electorate and the party are almost in direct touch, and the main issues of government are thus decided outside parliament, it has become all the more important that the electorate shall be politically capable. Political institutions may enable it the better to fulfil its task or may have the reverse effect. A short duration of parliament has the effect of consulting the people and causing the parties to renew their mandates after they have explained their case to the people and, to the degree we have previously analysed, educated them. But shorter terms have a further effect quite as important as these: they make it possible for the elector to compare promises with achievements on a greater number of occasions. This constitutes his experience, and it is important that he should have as much of it as is compatible with efficient government. At the present time an English voter who gives his first vote at 21 and his last, say, at 66, has an electoral life of forty-five years, that is, he votes a minimum of nine times—lives through nine campaigns, sees nine sets of leaders, nine sets of promises, nine parliaments—and their results. If the duration of parliament were legally four years, then the resultant electoral experience would be a minimum of eleven campaigns—and the rest. In so far as experience teaches, we have the right to expect that this would be a gain in electoral wisdom: if experience does not teach, then there is little case for democracy: and, if this reform is of little moment, it can only be said that all reforms are but of small moment,

<sup>1</sup> Cf. Waldecker, *Die Verfassung des Freistaates Preussen*, Art. 13.

<sup>2</sup> The German rule of four years was adopted as a compromise suggested by the Democratic Party between the period of three years which Preuss had proposed, and which the Constitutional Committee had passed by a narrow and, owing to abstentions, rather uncertain majority. On the second reading a narrow majority rejected the German Nationalists' amendment of five years, that now being supported by the Democrats. On the third reading, a small majority accepted four as a compromise between these extremes. Cf. Freytag Loringhoven, *op. cit.*, p. 99 ff.

<sup>3</sup> Cf. Katzenstein (Social Democrat), National Assembly (Heilfron, p. 3113): 'They are, as we all know, political weather vanes, the barometers by which one can tell the changes of electoral feeling.'

and the great changes in civilization are only produced by an accumulation of trifles.

We have said enough, at any rate, to reveal the intentions and effects of the law relating to the duration of parliaments; and to have emphasized the dependence of this question upon the strength of the Second Chamber, the existence or non-existence of the Referendum, and the extent to which Parliament is congested with business. If the Second Chamber is strong the Progressive is inclined to argue that it should be overcome by the frequently expressed view of the electorate: if it is weak, the Conservative is inclined to say that there should be frequent appeals as a check upon the First Chamber. Where the referendum exists, as in Germany, it has been argued that a long tenure will not result in senility and unpopular action, because there is a remedy. The more work, the more the necessity for knowledge, experience and, therefore, time.

**Incessant Pressure on Parliaments.** It is wrong to imagine that the proximity of dissolution and re-election is the only check upon the enterprise of parliaments. This would be to allow to modern party organizations only a fragment of their actual effectiveness. Party organization is permanent, and the central machine and the parliamentary leaders are linked to the localities by continuous ties. It has the means of knowing what people feel about its parliamentary activity, through the local caucuses and agents. The private member is sensitive to the views of his local committee and the local press, and this is not slow to complain when there is cause. Further, in times of crisis <sup>1</sup> members are approached by letter, telegram and deputations, and they cannot avoid a response if they value re-election: since the rise of the caucuses these are a natural vehicle for the expression of constituents' opinion; and the effect is that the electorate functions between, as well as during, elections. Moreover, all the vocational, cultural and local associations are incessantly vigilant and clamant. Modern development has given the lie to Rousseau's criticism, sound in its time: the lack of means to subject representatives to their instructions, and to compel a strict account of their parliamentary conduct to their constituents.

'On this point I cannot but admire the negligence, the carelessness and I dare to say the stupidity of the English nation which, after having armed its deputies with the supreme authority, demands no check whatever to regulate the use which they can make for seven whole years of their commission.' (*Gouvernement de Pologne*, XV.)

And again: <sup>2</sup>

'The English people thinks it is free; it makes a great mistake, it is not free except during the election of members of Parliament; as soon as they

<sup>1</sup> Cf. the protests raised by Nottingham in regard to the renewal of the lace duties in 1929.

<sup>2</sup> *Social Contract*, Bk. III, Chap. XV.

are elected, it is a slave, indeed nothing. In the short moments of its liberty, the use it makes thereof deserves that it shall be lost.'

That state of affairs, as we have seen, has passed away, and all parliaments are tethered to the people by thousands of living ties. The connexion is weakest in France, for the lack of parties gives full rein to a personal connexion founded upon the changeable opinions and fortunes of individuals and the personal and local favours which the deputy is able to obtain for his constituents. There is in a party an impersonal force and stability, a loyalty, which comes of the belief of each individual member that he is accountable to a large and powerful entity, that he cannot change his mind without the consultation and consent of others. This constitutes the essence of any *membership*, and it prevents change for narrowly personal reasons. Parties of this kind, of varying quality, however, exist in England, the U.S.A., less in Germany, less still in France. This type of association results in fairly continuous accord between the central authority and the members. Sometimes, however, especially in the U.S.A., the impulse from the localities is fictitious, emanating from outside the local party organization in some interested association which urges the constituents to send special instructions to their members. Examples of this are to be found in the Prohibition and the Women Suffrage movements. The further importance of this connexion between the party in the localities and the party in Parliament is this: not only does the locality urge on its parliamentary representatives, but the representatives immediately on the field of action, and in touch with their opponents, are able to see prospects and difficulties which could not be foreseen, and from them the localities learn in what manner their expectations must be modified. Thus again we are in the circle of influences which makes the Centre think with the mind of the localities, and the localities think with the mind of the Centre.<sup>1</sup>

**Dissolution.** Parliaments have a legal term, at the end of which they must be dissolved, and only in the U.S. Congress is that term not curtailable by dissolution. In England, France and Germany, the law permits an earlier dissolution, if necessary, and practice has so far kept the law alive. In England, the quinquennial period is a maximum imposed upon the Crown, but the Crown may dissolve Parliament and has often done so, before the end is reached. In France the Chamber may be dissolved by the President (with the consent of the Senate),<sup>2</sup> but convention has worked against the practice and the Chamber has, practically, a fixed term of four years. We are, therefore, concerned with the intentions and effects of dis-

<sup>1</sup> Cf., at once, the diagram, the Viscera of the Modern Leviathan, in Chapter XXI, *infra*.

<sup>2</sup> Law of 24 Feb. 1875, Art. 5.



solution in England and Germany and the causes and effects of the convention which has grown up in France.

In England the right of dissolution lies with the Crown, and in earlier times it was used by the Crown to get rid of an uncongenial parliament at a moment favourable to its own friends' prospects of success. But with the democratization of the Constitution and the rise of the convention that the Cabinet requires the confidence of the House of Commons, it naturally happened that the initiative in this matter passed into the hands of the Prime Minister. Not that the Crown was not in earlier days advised by its Ministers, but now the advice is given not in the personal interests of the Crown, but 'in the interests of the country'. This means, of course, that the party view of the national interest rules. Thus, then, authority to dissolve is located in the Cabinet.<sup>1</sup>

By what motives have Cabinets been moved, and what is the generally expected rule of dissolution, which will govern the advice tendered to the Crown? The history of the nineteenth century shows that on one occasion only did a Parliament run its full seven years and this was the Parliament of 1867-73, when the Liberals, led by Gladstone, had a large and homogeneous majority<sup>2</sup> gathered from among the new voters by going 'on the stump'. Before this Parliament parties were either so evenly divided after elections, or so cut across and heterogeneous, through religious issues and sudden foreign contingencies, or by the protectionist-free trade struggle, that frequent changes of ministry occurred without, however, adding any strength to the new government. So great was the need to end parliamentary stagnation, and the uncertainty of balanced opinion, that both parties agreed upon dissolution.<sup>3</sup> Majorities and minorities of less than a score of votes marked this time: their composition being different on each division. And after the Parliament of 1867-73 the serenity of majorities was troubled by a new difficulty: the parties were split by Home Rule and Coercion, and the House rejoiced in a solid block of some sixty Home Rulers who derided the calm and stability of English politics. The impasse of 1885 could only be escaped by an understanding between the Liberals and Conservatives to dissolve. A year later it was necessary to consult the country, for the Liberal Unionists went over to the Conservatives to defeat the Home Rule Bill. A fairly long parliament was the result, during which the Liberal Opposition was excogitating the Newcastle Programme and the Conservatives strangled Ireland. The election of 1892 gave the Liberals a majority only with the help of the Irish;

<sup>1</sup> This subject is treated further, and from a slightly different angle, in the Chapter on the British Cabinet, *infra*.

<sup>2</sup> A majority of 120. May, *Constitutional History*, III, 73.

<sup>3</sup> E.g. in July, 1852, after Palmerston's exit from the weak Russell government. Cf. Spencer Walpole, *Life of Lord John Russell*, II, XXII and XXIII.

it could not last and was defeated on a minor matter of supply. In 1895 another election occurred, and a seven-years' Parliament followed the Conservative successes.

The 'khaki election' of 1901 was fought on the Boer War issue: the Conservatives obtained an enormous majority. The Balfour Cabinet succeeded to the boredom which is the aftermath of war-excitement, when victory has to be paid for, and it was smitten with intestine strife when Chamberlain began his Tariff Reform movement; prominent members, including Chamberlain, resigned from the Cabinet. The issue of Chinese Labour and the Taff Vale Judgement arose. By-elections were disastrous.<sup>1</sup> Irish troubles beset a government which could neither leave Ireland nor crush her, and, in December, 1905, two years before it was legally necessary, Mr. Balfour resigned. The Government felt that it was not wanted; that its mandate had been outstayed; and what is of even more importance than these events and doctrine, was the fact that Balfour, faced with a new policy of a rather fundamental kind, had declared that it would be neither possible, nor right, for the Government to adopt any system of fiscal reform unless it had first been submitted to the country.<sup>2</sup> Resignation was also one way of clearing up the internal difficulties of the party.

The next dissolutions of interest were those of 1910, in January and December. They were deliberate invocations of the electorate to decide upon two issues, the social and fiscal reforms of Lloyd George, and the consequent reform of the House of Lords. In 1918, after the Armistice, a dissolution took place; Parliament had sat since 1910, through the War, and Mr. Lloyd George now sought a mandate for his policy of peace and reconstruction. Four years afterwards, in 1922, the Coalition Government dissolved owing to the difficulties of continued co-operation between the Conservative and Liberal elements of the Cabinet, neither side feeling satisfied with its share in making policy.<sup>3</sup> A Conservative majority followed, but, in 1923, the question of Protection, becoming once more acute as a remedy for unemployment, Mr. Baldwin resigned on the ground that so great a reform ought not to take place when his predecessor, Bonar Law, had given a pledge against it at the election.<sup>4</sup>

Then began a period of parliamentary difficulty: the Labour Party, which had been a third party, suddenly developed great electoral and parliamentary strength, while the Liberal Party did not disappear. No single party then obtained a clear majority over the other two. The Liberals helped the Labour Party to overturn the Conservatives, and did not vote the Labour Party out of office until

<sup>1</sup> Cf. Spender, *Life of Sir Henry Campbell-Bannerman*, Vol. II, Chap. XXV.

<sup>2</sup> Spender, *op. cit.*, II, 168. Cf. also Sir Almerio Fitzroy, *Memoirs*, II.

<sup>3</sup> Cf. Beaverbrook.

<sup>4</sup> See Chapter on Constitutions, *supra* footnote.

nearly a year had elapsed. When the inevitable defeat occurred, the question arose, 'In such a state of parties what is the rule for dissolution?' When there is no certainty of a majority government ought the minority in office to advise the Crown to dissolve in order to escape from parliamentary difficulties and perhaps improve its electoral position? The vista of a long and indecisive series of elections at short and disturbing intervals appeared. The ostensible question revolved around the position of the Crown: whether it could reject the advice given by the Cabinet of the day, and in its proper place we discuss that aspect of it; but the real question was what rule should guide the party in advising dissolution?

History gives no precise authoritative answer, but, as we have seen, it tells us in what circumstances dissolution was thought advisable. Those circumstances are:

1. When the position of parties is such as to produce deadlock, preventing legislation which any ministrable party conceives necessary, and criticizing administration in so emphatic a manner that the Government can no longer preserve its dignity.

2. When a Government sees convincing signs that it is no longer trusted by the country.

3. When a policy of fundamental importance is newly evolved and there has yet been no opportunity of plainly consulting the country upon it.<sup>1</sup>

The psychology of average members of parliament indicates the effect of a threatened dissolution.<sup>2</sup> It throws them all into a state of frightened self-inquiry which is followed by a tightening of party discipline. If the Opposition is sanguine of its chances at the next election, it closes its ranks and becomes less yielding. If its chances are weak, the threat of a dissolution, which need not be actually made, for it is known by all that such must occur upon any first-class defeat of the Government, will cause it to search its mind once more, and as with the Liberal Party in recent years, to yield more than it would do in independence. As for the followers of the Government, the threat of dissolution is a means of consolidating them in support of the Cabinet—for to expose one's own party to the risk of overthrow, to surrender one's own seat, and to invite the anxiety and expense of fighting to regain it, is more than most members will readily do. Dissolution thus throws power into the hands of the

<sup>1</sup> See article in *Round Table*, December, 1929.

<sup>2</sup> Cf. Low, *The Governance of England*, Chap. 6: 'Whatever motives may have induced a member to seek a place in the House of Commons, he will surely want to hold it as long as he can, and with as little trouble and expense as possible. . . . From his personal point of view a short Parliament is a mistake, and a premature dissolution a nuisance. . . . The Ministry can often subdue rebellion in its own ranks, and to a certain extent keep its antagonists from going to extremities, by allowing it to be known that if certain things are done, or not done, there will be a general election.'

leaders, for they are in the best position to ascertain when it will be most advantageous to their side, and they are able to decree that aid shall be given or refused to a candidate in proportion as he has served his party well.

The German Constitution of 1919 contains a clause (Art. 52) empowering the Reich President to dissolve the Reichstag, but only once for the same cause. What does this mean? The spirit of the Constitution is strongly democratic. Now the experience of France influenced Germany very powerfully—but by its pathological qualities. The Germans were anxious to avoid the evils inherent in French Parliamentarism. Therefore, in giving the Cabinet large powers, safeguards were created against developments like the barren and even harmful activity of the French Chambers. The Referendum and the Initiative were introduced. So, also, was a Presidency, elected directly by the people to act as a counterweight to the Reichstag. The instrument of his power in this particular respect was the power of dissolution. At once difficulties arose; was the Cabinet to countersign the order for dissolution or not? If this was affirmed, then the Cabinet would have at least as much authority to order a dissolution as the President, and, then, the President's power would be smaller than the Conservatives, and even the Liberals and some Social Democrats, desired. If it were denied, then an authority independent of the Cabinet would have the power to intervene, and the centre of political gravity would be shifted from the political parties to a single person—a proposition unacceptable to the majority of the Assembly. Although popular election of the President reduced the opposition to his independent power of dissolution, ministerial responsibility was adopted.<sup>1</sup> The result, then, is, that the President may declare himself dissatisfied with the parliamentary situation and suggest to the Cabinet the desirability of a dissolution.

This, however, has not yet arisen in practice. On the other hand, Ministers may desire a dissolution, and can resign in order to get it—but they will be successful in their demand only if the President cannot find another practicable set of ministers. This may easily occur owing to the large number of parties, and the size of the Extremes who may join in overturning a government, but cannot co-operate in a new one. In fact, not all Cabinets which have threatened dissolution have been able to secure it. It has been granted them on three occasions of parliamentary impasse. It has also been refused by President Hindenberg, who has preferred to urge the Cabinet to continue in office and carry through its less controversial business.<sup>2</sup>

<sup>1</sup> Cf. Pöhl, *Die Auflösung des Reichstags*, 1922.

<sup>2</sup> A controversy has arisen on the question whether the President may dissolve the Reichstag without the countersignature of any of the existing ministers, but with that of the incoming person whom he appoints as Chancellor. This proposition is considered again in the chapters on Cabinets and Chiefs of State, *infra*.

Let us consider (1) the circumstances in which it was conceived dissolution was appropriate ; and (2) those in which it has already been used. The first occasion was in March, 1924. The Marx Cabinet was based upon a Coalition of the middle parties (Democrats, Centre, Popular Party, Bavarian People's Party and two Ministers not in the Reichstag). These together mustered about 189 members ; and the potential opposition was, therefore, 270 members. The German Nationalists with 71, the Social Democrats with 102, and the Independent Social Democrats with 84, could, between them, overturn the Cabinet at any time. The Government, therefore, lived on sufferance. This was already the seventh government since the elections of 1st June 1920. One had fallen owing to the London ultimatum, another fell through its own internal weakness and the impossibility of forcing the German People's Party to coalesce with it, the irruption into the Ruhr caused a reorganization, and a sixth fell when this combination failed to survive the antipathies of the coalition parties, while the seventh shattered upon the difficulties between the Reich, Bavaria and Saxony. And now the minority government expressed the desire that certain decrees based upon the Emergency Powers Acts <sup>1</sup> should be continued. It was folly, however, to create a new ministerial crisis which would produce a fresh ministry when the general elections were only three months away. Perhaps the elections would settle the question ? They did not. The parties came back as ill-assorted and each as weak as before. Within six months it was found to be impossible either to maintain the existing government (the Marx Coalition as before) or to found a ministry with any better prospects of life. In October, 1924, therefore the Reichstag was dissolved again. In July, 1930, the Brüning Government, a coalition of minority parties, dissolved in face of a coalition of extremes. The object of the dissolutions was clear and laudable. Parliament was impotent, and it was believed that reference to the electorate would produce a shift of votes sufficient to break the deadlock. Doubtless if there were numerous general elections the disturbance would in time produce a *pre-parliamentary coalition of parties* or voters and thus provide stability for the Government.<sup>2</sup> The parties and the people would be continually faced with the problem of instability in government caused by small, numerous, and irreconcilable parties—and the question would arise—why not sink your minor differences for the sake of good government ? Though Germany is only slowly learning the proper lesson, the power of dissolution is a wholesome and necessary one if Parliament is to learn a proper dependence upon the people ; and if we now compare the case of France, where the right to dissolve has withered, we shall even better appreciate its significance.

<sup>1</sup> *Ermächtigungsgesetze*, 13 Oct. and 1 Dec. 1923.

<sup>2</sup> Such as that attempted by the German Democratic Party and a number of small groups in the election of 1930—they formed the

The Constitution of 1875<sup>1</sup> gives the President, with the assent of the Senate, power to dissolve the Chamber of Deputies. The debates of the National Assembly show that this body (which was strongly monarchical) was mainly influenced by the desire to give the Presidency, which they had designed as nearly as they could to be the niche for a King, a weapon of defence against encroachment by Parliament.<sup>2</sup> Prévost Paradol in his *La France Nouvelle*,<sup>3</sup> which had a great deal of influence upon the more thoughtful members of the Assembly, had argued that the greatest peril to liberty and order in parliamentary government was a discordance between the constituted authorities and public opinion. In a country with a ministry based upon parliament and the people this danger was produced by the gradual or sudden loss of support, and the stubborn retention of office, by the ministry. Dissolution and new elections are the only sound remedies. Could you give this power to a President, himself elected by a party? Dependent upon its friendship after his term, his sense of duty would hardly be strong enough to force it to the country. 'It is to count too much on the idea of duty. It is to demand too much out of pure love for the public good, and when institutions sin by this noble excess, human weakness has its revenge by leaving them unused or destroying them.'<sup>4</sup> The power of dissolution may well be given to a king who stands above parties and has an independent love of his country. It is useless to give it to the Cabinet, for this will never utilize the power against itself or its followers. But a king *supported by an Upper Chamber* could with public advantage exercise such a power.<sup>5</sup>

We must observe that Prévost Paradol imagined no other case than the loss by the majority of its support in the country. But he did arrive at an inkling of what has actually become the stumbling-block of French parliamentary life: too many parties, a surplus of personal advertisement, an excess of theatrical tactics—factors which have not only deprived the parliamentary majority of social support in the country, but have even prevented a stable majority with an appetite and ability for work from ever coming into existence. The National Assembly followed Prévost Paradol and its own desire

<sup>1</sup> Law, 25 Feb. 1875, Art. 5.

<sup>2</sup> Cf. *Annales de l'Assemblée Nationale*, Paris, 1875, XXXVI, 334 ff.: 'The division of the legislative power, said the honourable M. Antonin Lefébvre-Pontalis, is a barrier against the mistakes and the rash acts which are inevitable when there is only one Assembly; it makes the two assemblies, by submitting their decisions to revision and to a kind of right of appeal, deliberate carefully; it thus helps to prevent hasty, ill-considered and irreparable proposals. Whatever precautions a single Assembly may take against itself, it can always rid itself of them with impunity; thus security against the dangers and abuses of absolute power, which should not be tolerated anywhere, must be sought elsewhere and not in the single Assembly.'

<sup>3</sup> (1869), pp. 143–7.

<sup>4</sup> *Ibid.*, p. 144.

<sup>5</sup> *Ibid.*, p. 106.

to strengthen the executive and vested the right of dissolution in the President,<sup>1</sup> with the consent of the Senate.

The right was used once, in circumstances so unfortunate as to cause the destruction of the power. The Chamber of Deputies of 8th March 1876, contained a large republican majority. Marshal MacMahon, monarchist, elected President by the Monarchist National Assembly upon the fall of Thiers, sought to overcome the anti-clerical and republican impulses of the Chamber. He caused the resignation of Jules Simon on the Seize-Mai, and, faced with an exceedingly restive parliament, asked the Senate to support a dissolution. By a small majority (149 to 130), and after grave debate, consent was granted, and this in a Senate one-quarter full of life-members appointed by the Monarchist Assembly. A constitutional right had been used in an unconstitutional spirit, not in order to serve the electorate, but directly to thwart it.

The power to dissolve fell into disrepute, and has never since been used, and France has seriously suffered in consequence. As Leyret has put it : '*Le Parlement est tout : la nation n'est rien.*'<sup>2</sup>

Discussion of the question in France has, however, proceeded on rather unreal lines : it has been made part of the theory of the Separation of Powers. It is assumed that liberty cannot be secured unless powers are separated, and if, therefore, the Chamber attempts to control too much, and thus infringes the rule of separation, the power of dissolution is required to free the executive from encroachment. But the matter ought rather to be judged by its direct results than as a corollary of a general proposition in government. The fact, radical and striking, is, that *no Cabinet in France has the power to counter-attack an insurgent assembly*. The members can, and therefore do, allow themselves all liberties until the proximity of an election. They waste time, overturn ministries, stage interpellations, and as Faguet has said, labour without accomplishment. It is not the Cabinet which has been so much at fault (as M. Prévost Paradol calculated) but parliament ; the executive has needed defence, but never so much as the country itself. Though a government may be busy with the most urgent affairs, its work can be stopped by an interpellation, for the interpellation is a threat to its existence ; nor can it, by making the subject a question of confidence, permanently quash the interpellation and frighten the errant deputy by the thought that the Cabinet will fall and crush him as well as them. If the Commission on the Budget plays with the Finance Bill all the year round the Cabinet cannot reduce it to order. If its programme is disturbed by purely obstructive amendments and discussion, it is forced to sit by, vociferous, or sighing, but idle, or to resign—which is exactly

<sup>1</sup> See the discussion in Leyret, *Le Président de la République*.

<sup>2</sup> *Ibid.*, p. 196.

what the aspirants for office wish. There is no power to secure the working strength of the government, or the correspondence between public opinion and parliamentary activities.

It must not be forgotten that the power in its present form is the less employable because of the part the Senate is required to play in it. Though the Senate has few enemies, it is barely tolerated, for its powers are considerable, and its emanation from popular election, although by an indirect route, gives it a conceit of which the Deputies are jealous.

Even now the true importance of dissolution is misunderstood by French thinkers. The most recent discussion is Professor Redslob's,<sup>1</sup> and his views are these. To dissolve is to demand arbitration by the people between the ministry and the assembly: but arbitration is possible only as between two equal subjects, not between subjects of unequal strength. But the Chamber is necessarily weaker because it has to be destroyed before the arbitration can take place. That is, the ministry is stronger, and is for a short time even free from the competition of its rival. To destroy the Chamber is an act of authority: only a strong institution can do it: but the President is a weak institution, derived as it is from parliamentary election. Hence, there cannot be a dissolution, especially since the Cabinet is itself appointed by this weak institution.

'The result is that the fundamental condition of dissolution is not present, neither the ministry which is the rival of the Chamber, nor the President, who must show authority by breaking it in order to subject it to the judgement of the people, are independent powers. They are not the equals of their antagonist. That is why the arbitration established by dissolution is impossible.'<sup>2</sup>

Apart from the fact that this argument contains a good many internal contradictions, the whole attitude is erroneous. The principal fallacy resides in the introduction of the notion of arbitration and the assumption that equality is necessary for it. Even if this were right—which it is not—this has no application to the case considered. The real issue is between an appeal to the people to remedy internal conditions in the Chamber, or omitting it, to leave the Chamber free for the display of disorganized and incoherent animosities. If the latter is preferred, and it has been since 1877, then the cause is no solemn nonsense about arbitration and its supposed nature, but that the Chamber and the Government knew and know that the people do not care enough about regular and systematic government to support either the one or the other in any action they may take. The Chamber is regarded with cynicism, the Ministry with suspicion, the President with humour and a little contempt. The causes are the experience of former régimes and national character.

<sup>1</sup> *Le Régime Parlementaire*, 1922.

<sup>2</sup> *Ibid.*, p. 178.



In England dissolution is permitted because all are convinced that whatever party governs, there must be government; and that deadlock and verbal contests are insufficient as fruits of parliamentary endeavour, and must be ended by an appeal to the people, which it is better that the Government should make, than that it should not be made at all. Though it pains the Government and members of Parliament to give up office and a seat in the House, these are felt to be necessary and proper, if reluctant and belated, sacrifices. What Chamber of Deputies or French Cabinet has, since the rise of the French Republic, been imbued with such a spirit? No President can do what these bodies are unwilling to do; and that which has caused good party organization not to arise is equally the cause of this—a lack of practical governing sense in the people, which is content not to get results in action and behaviour, but to ‘unpack its heart with words and gestures’. It is true that the British Crown, by its hereditary position, presents an appearance of impartiality and national concern, in a dissolution, not reproducible in France where the chief of state is elected—but this is not why dissolution is possible in England and impossible in France. All these institutions are founded on the national character, and Redslob only begins to touch the problem at the close of his discourse, when he says: ‘Finally, the current of opinion hostile to the executive which characterizes France and derives from the vicissitudes of its history, does not exist in England.’<sup>1</sup> The question is not really one between Chief of State and Parliament, but between Parliament and the Cabinet; it is whether the Cabinet shall have the right to challenge a fractious parliament, and say, ‘Now consider well: is your attitude dictated by personal considerations or by considerations of benefit to the State; are you thinking of yourselves or your constituency? Compare and choose! If you choose to overturn us, you must answer to the people for it!’ This often gives the Cabinet a coercive power over its followers and the Opposition; but government is not perfect. The problem receives further attention in the chapter on Chiefs of State. Let us merely add that Redslob’s doctrine influenced Preusz in his drafting of the German Constitution of 1919.

\*   \*   \*   \*   \*   \*   \*

Thus mandates, and the frequency and dissolution of parliaments, formally maintain the correspondence between people and parliament. But we are not yet free to observe how parliaments use their powers, for they themselves are not organized upon the simple basis of one

<sup>1</sup> *Le Régime Parlementaire*, p. 181. This doctrine should be compared with that in Esmein, op. cit., II, 180 ff. and Duguit, op. cit., IV, 572 ff. Both these authors incline away from the treatment of the subject as a branch of the separation of powers (i.e. the Right of Dissolution as a defence of the executive) and recognize the importance of the Right of Dissolution as an instrument for clearing away difficulties in the Chamber of Deputies and in the relations between this and the Cabinet.

chamber, but for various reasons and from diverse causes are divided into two. We must, therefore, pause for a brief inquiry into bicameral arrangements, and having discovered how power is divided between the assemblies, we can proceed to a discussion of the procedure and activities of the more popular, or the First, Chamber.

## CHAPTER XVII

### SECOND CHAMBERS

**W**E must distinguish. Parliaments are bicameral for two broad and different reasons : as a result of the federal system, and as the institutional result of a desire to check the popular principle in the constitution. This does not mean that in Federal States the Second Chamber was designed only to represent the States ; and if we can take the records of the constitutional conventions and their members as evidence, it is likely that there would have been some sort of Second Chamber, even if it were not required by the federal principle ; it does not mean, therefore, that there is absent from these (the U.S. Senate and the German Reichsrat) the intention or spirit of a curb. We have now to examine the constitution of Second Chambers as a check upon the rule of Number.

**A Multitude of Counsellors.** If, then, we contemplate the history of government, we find that two basic motives have contributed to the establishment of Bicameral Systems. The first is, perhaps, the more universal, and is likely to be the more enduring. Most human beings desire a multitude of counsellors, and all the advice they can obtain : whether from fear of taking responsibility and the desire to absolve themselves from blame if matters go awry, or from the wish to repair their lack of knowledge or judgement. It is not that others need to be convinced, but that the mind is clarified by talking out, which implies thinking out, the issue. Indeed, for most people, to talk is the only way to think. This tendency will be found everywhere operative and particularly in proportion to the gravity of the object ; and in cases of real urgency, such as dangerous illness, the number of counsellors is limited only by the resources at the patient's disposal. It is not a question of courage or fear to innovate, but a sound sense of self-preservation, which leads men to take counsel before proceeding : it is not so much a question of whether, as *how*, to act.

Generally, then, men are circumspect, and therefore they establish institutions which compel judgements to be deliberate. They establish delays, and adjournments, notices of resolution, and a multitude of advisory bodies. But in affairs of State the result of any resolution is widespread, hence even greater care to prevent abuses of power.

Further, deliberation and solemnity add to the chances of obedience, and strengthen loyalty; they seem to have exhausted the possibilities of error and of the arbitrary, and assume the air of the inevitable, the decree of Nature, and since it is useless to rebel against Nature, adaptation is the only road to relief. These motives are the constant and essential nucleus of most arguments in favour of more deliberation—or in other words, a Second Chamber; but the phrases in which the arguments are couched are usually less conscious, more conventional, and often more rhetorically picturesque.

**The Defence of Possessions.** Secondly, apart from the need for mature deliberation, Second Chambers have come into existence for the same reason as so many other institutions: those who have power and possessions create all possible barricades to prevent their loss. Revolution is not the only movement of the human spirit to produce barricades: conservatism has produced more. Indeed, all Second Chambers have been instituted, and are maintained, not from disinterested love of mature deliberation, but because there is something their makers wished to defend against the rest of the community; and, moreover, it is not always difficult to trace this motive to its sources and channels. The diminution of social inequality, and the downfall of social monopolies, may in time cause the disappearance of this protectiveness, but the spontaneous desire for deliberation in a vast complex society will not easily fade or lose its need for institutional embodiment. The final question is, what form ought this best take?

We are concerned with the British House of Lords, the French Senate, the American Senate, the German Reichsrat,<sup>1</sup> and we shall

<sup>1</sup> The composition and powers of some other Second Chambers may also be noted:

    BELGIUM (Constitution of 1831; amended 1893)

*Composition* (Total: 153. Term of Office: 4 years. Age qualification: 40).

(i) Senators elected directly (93 in number, half that of the Lower Chamber).

(ii) Provincial Senators (as in France) elected by Provincial Councils (1 for every 200,000 inhabitants: 40).

(iii) Co-opted Senators—drawn from distinguished citizens of the State—elected by the Senate (20).

*Powers.* Money Bills and Bills relating to the strength of the Army must be initiated by the Lower Chamber; otherwise co-equal authority.

    SWITZERLAND (Federation. Constitution of 1874)

*Composition* (Total: 44. Term of Office—varies according to Cantonal regulation).

Senators (2 for each Canton) are elected (*a*) by direct election or (*b*) by the Cantonal assemblies.

*Powers.* Co-equal authority.

    AUSTRALIA (Federation. Constitution of 1900)

*Composition* (Total: 36. Term of Office: 6 years; half retiring every three years).

*Powers.* Initiation and amendment of Money Bills not permitted by the Constitution; otherwise co-equal with representatives.

    AUSTRIA (Federation. Constitution of 1920 amended 1922 and 1925)

*Composition* (Total: 50. Term of Office: Varies according to that of the Provincial Diet).

(Footnote continued on next page.)

consider first, the general trend of their development, secondly, their composition and power, and thirdly, their political effect.

### THE HOUSE OF LORDS

The House of Lords came into existence in the first blithe unconsciousness of political development. It was perfectly natural for conquerors and the owners of great estates to give counsel to the Crown, natural, too, for the learned and propertied ecclesiastics to form part of the empowered circle of the Great Council. Soon the lesser property-owners were excluded and, individually, insignificant barons that they were, relegated to a class below the peers.<sup>1</sup> The magnates even compelled the Crown to accept them as participators in government, on the basis of a right inherent in their position and not created by the Crown. They obtained safeguards against the King's own judges in the institution of *judicium parium*, judgement by peers, which extended beyond the confines of law into the legislative acts of parliament—the distinction in the fourteenth and fifteenth centuries being not yet as clear as it became when parliament had become a body representative *against*, rather than a council *with*, the King. We cannot enter into the rights and wrongs of the learned controversies regarding origins; all we need to know is what all scholars accept, namely, that land tenure, the hereditary principle, and peerage, a complex of political and legal privileges, became indissolubly

Senators are elected by the Provincial Diets in proportion to the number of inhabitants of the Province.

#### Powers.

- (i) Amendment and rejection of Bills (which may be subsequently passed by the Lower Chamber by a majority of at least half the total membership).
- (ii) No power to amend the Estimates.
- (iii) Power to order a referendum on any law it has passed, before promulgation.
- (iv) Approval required for any political State treaties and other treaties involving a change in the law.

#### CZECHOSLOVAKIA (Constitution of 1920)

*Composition* (Total: 150. Term of Office: 8 years. Age qualification: 45).

Senators are elected by direct suffrage.

#### Powers.

- (i) Legislative initiative restricted with regard to Budget and Defence Laws.
- (ii) A Diet Bill rejected by the Senate must be passed again by a three-fifths majority of the Diet.
- (iii) Any Diet Bill must be considered within a period of six weeks (four weeks in case of Budget).

Certain modern Constitutions contain no provision for a Second Chamber, e.g. Yugoslavia (1921); Estonia (1920); Latvia (1922); Lithuania (1922); Finland (1906).

Queensland abolished the Second Chamber in 1922.

<sup>1</sup> Cf. Pollard, *op. cit.*, p. 90: 'Greatness, not tenure-in-chief, constitutes the right or the liability to a special writ of summons to the *magnum concilium*, which in the reign of Henry III and Edward II seems to have been a council of magnates.' Cf. also Pike, *A Constitutional History of the House of Lords*, London, 1894, Chap. VII; Stubbs, *The Constitutional History of England*, 3rd Ed., Oxford, 1883, Vol. II, Chap. XV; Spalding, *The House of Lords*, London, 1894, Chap. III; Hallam, *View of the State of Europe during the Middle Ages*, 9th Ed., London, 1846, Vol. II, Chap. VIII, Part III.

associated, and associated by the forceful pressure of landed proprietors and their descendants.

It is interesting to observe that until parliament had evolved so as to become a potential challenge to the King's will, and an independent source of authority, the magnates preferred to stay at home 'lording' it in their territories. They had the goods; and to prevent their undue conversion into royal revenue was a virtue. Further, a power threatened is a power which arms: when the Crown found itself surrounded by a customary circle of peers outside whom convention dictated that none others should be summoned, it (Richard II) began the practice, which has had such remarkable effects in recent generations, of creating peers by letters patent, and here estates or a title indicating estates, followed in keeping with the ancient association. Lastly, the House of Lords came to be founded not only upon the hereditary principle, but upon a particular application of this principle: of primogeniture; for this preserved the size of estates and had become a cherished rule of succession. Here, then, in this branch of the council were concentrated lords territorial and hereditary, lords created and hereditary, lords spiritual, but not hereditary. At first commons and lords met in common council. Towards the end of the fourteenth century burgesses and knights drew more definitely and continuously together as one body, consulted and acted in common, and separately, in a special place: the King, the Lords, the Chancellor and Judges, remaining, as it were, as a single body in possession. Little by little two Houses emerged *in one Parliament*, each with its own characteristic and now familiar offices and body of usages, while individual petitions requiring the judgement of Parliament as a high court had changed into general petitions. But general petitions are politics, and their result is law, for more clearly they represent the demands of one part of the population upon the rest.

This division into two Houses was, then, the simple result of the appropriation of governmental authority by those who possessed economic power and the prestige of conquest and social leadership, and the unavoidable consultation of representatives of the rest of the population, since the threat of unrest and fiscal resistance was ever emergent. The division was a division of interests, and not the consequence of a desire for mature deliberation and a check upon a tumultuous and self-willed democratic assembly.<sup>1</sup>

That came later, much later, in the middle of the nineteenth

<sup>1</sup> Cf. Harrington, *Oceana*, 'The second part of the preliminaries'. But why were there only two and not more Houses, as in the Estates of the Continent? The answer is to be found in the recesses of geographical and historical good fortune. One King established over a country not large and unbounded, but comparatively small and well-defined, made easy the centralization of parliaments. Moreover, there were never the strong class distinctions—the severity of estate conceit which produced such fearful results in continental history. Hence the main division was into two and not more than two.

century, when a powerful and self-conscious democracy began to ask the question, *quo warranto?* of a House founded upon every sort of title except utility.<sup>1</sup>

#### THE U.S.A.

The political theory of a second chamber was, in fact, first developed by American statesmen in the Convention of 1787, and is to be found in its *Records*, and, more systematically, in the *Federalist*. The Convention was impelled towards the establishment of the Senate not only by the necessities of Federalism, but by the practical and immediate fear of tumultuous democracy which, in the few years since the end of English rule, had acted very intemperately. Nearly all speakers who discussed the topic did so with reference to events in the States. McHenry of Maryland, for example, said<sup>2</sup>:

‘Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible, that the power of government exercised by the people swallows up the other branch. None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a more powerful Senate, but the late distractions in that State have discovered that it is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient.’

Madison took a large part in the debates relating to the Senate. The ends of a Second Chamber according to him were: the (1) defence of the people against their rulers—which might be secured by a ‘division of the Senate between different bodies of men, who might watch and check each other’, (2) the protection of themselves against their own transient impressions. The latter end was important since temporary errors were liable to result from (a) want of information as to their true interest, this being shared by representatives elected for only a short term and occupied, perhaps, with other affairs, and (b) fickleness and passion in themselves and a numerous representative body. Therefore, a fence was required, and this must be a body, enlightened, of limited number, and the ‘firmness seasonably to interpose against impetuous counsels’.<sup>3</sup>

Madison’s thought, however, reached further than this. Liberty means the development of diversity. The Constitution was designed to secure liberty. Then, said Madison, different interests may clash, for in all civilized countries the people fall into different classes having a real or supposed difference of interests.

‘There will be creditors and debtors, farmers, merchants and manufacturers. There will be particularly the distinction of rich and poor. . . . We cannot,

<sup>1</sup> Cf. Pinckney’s analysis of the English Constitution in the American Federal Convention, *Farrand*, Vol. I, p. 410.

<sup>2</sup> *Farrand*, I, 26, 27.

<sup>3</sup> *Ibid.*, I, 422.

however, be regarded even at this time as one homogeneous mass, in which everything that affects a part will affect in the same manner the whole. In framing a system which we wish to last for ages, we should not lose sight of the change which ages will produce. An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, and secretly (*not secretly, oh gentle Madison !*) sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this country, but symptoms of a lively spirit, as we have understood, have sufficiently appeared in certain quarters to give notice of the future danger. How is this danger to be guarded against on republican principles ? How is the danger in all cases of interested coalitions to oppress the minority to be guarded against ? Among other means, by the establishment of a body in the Government sufficiently respectable for its wisdom and virtue, to aid, in such emergencies, the preponderance of justice, by throwing its weight into that scale. Such being the objects of the second branch in the proposed Government, he thought a considerable duration ought to be given to it.<sup>1</sup>

Nine years was not too long ; and it should come so late in life that the Senator would not mind, on public or private grounds, if he were not re-elected.

**Duration of a Senate and Age of Senators.** We need not pursue the topic to the point of exhaustion. Members were agreed on these general principles<sup>2</sup> : the only controversy was regarding the composition of this assembly : its selection, the age of its members, its duration, and so on. The opposition to a Senate of long duration was 'that it might by gradual encroachments prolong itself first into a body for life, and finally become a hereditary one',<sup>3</sup> and that long separation from constituents would cause 'attachments different from that of the State'.<sup>4</sup> But Hamilton's plan went furthest. In that famous intervention in debate which earned him the credit of being a monarchist, he scornfully rejected Randolph's proposition that a Senate of seven years was enough.<sup>5</sup> Could it save the few against the many, or the many against the few ? No. Neither had a defence. But observe the British House of Lords !

'It is a most noble institution. Having nothing to hope for by a change, and a sufficient interest by means of their property in being faithful to the National interest, they form a permanent barrier against every pernicious innovation',<sup>6</sup> whether attempted on the part of the Crown or of the Commons. Gentlemen differ in their opinion concerning the necessary checks, from the

<sup>1</sup> Ibid., I, 431.

<sup>2</sup> Sherman : 'Steadiness and wisdom' ; Gerry : 'Stability or efficacy' of government ; Mason : 'Weight and firmness' to 'secure the rights of property'. Therefore, also, a qualification of property should be annexed to the office.

<sup>3</sup> Wilson, *Farrand*, I, 426.

<sup>4</sup> Pinckney, *ibid.*, I, 430 ; i.e. distinguishing the States from the Federation.

<sup>5</sup> 18 June, *ibid.*, I, 282 ff.

<sup>6</sup> Query : Does this mean every innovation is pernicious, or did the House reject only innovations which were pernicious ?



different estimate they form of the human passions. They suppose seven years a sufficient period to give the Senate an adequate firmness, from not duly considering the amazing violence and turbulence of the democratic spirit.'

Did not the experience of the New England States prove that popular passion spread like wildfire and became irresistible? . . . etc., etc. . . . 'What is the inference from all these observations? That we ought to go as far in order to attain stability and permanency as republican principles will admit.' How far? '*Let one branch of the Legislature hold their places for life, or at least during good behaviour. Let the Executive also be for life.*' Indeed, this would have produced what was claimed for it—a permanent will, a weighty interest! His suggestion was, then, a Senate of persons elected to serve during good behaviour; election to be indirect. A later edition of the suggestion required that candidates should have an estate in land.<sup>1</sup>

In the *Federalist*<sup>2</sup> the Senate was defended. The age of 30 was proper since the Senator's duties required a 'greater extent of information and stability of character'. Choice by the State legislature constituted 'a select appointment'. The number would always be far smaller (two from each state) than the House of Representatives: this would counter 'the propensity of all single and numerous bodies to yield to the impulse of sudden and violent passions, and so be seduced by factious leaders into intemperate and pernicious resolutions'. A long duration (nine years) would promote 'great firmness'. A bicameral system doubles the security to the people against schemes of 'usurpation or perfidy' where the ambition or corruption of one would otherwise be sufficient. A due acquaintance with the objects and principles of legislation is not to be expected from people called from pursuits of a private nature, and in office only for a short time. Recent experience showed this. A rapid succession of new members of Congress would cause 'mutability in public councils'; but change of opinions and measures is desirable only in a temperate form. The effects of instability are: loss of foreign confidence in the country, uncertainty of the law, opportunities to speculators, and perils to prudent producers, but most important of all, is the loss of reverence for governments which are infirm and disappointing to men's hopes.<sup>3</sup> Further, only a 'select and stable' body can become sensible to the opinion as to the qualities of foreign countries—in a small body, it is argued, the praise and blame, pride and consequence of each member is involved. Not so in large bodies. Moreover, the longer the tenure, the keener the sense of responsibility for long-period plans; like a 'succession of well-chosen and well-connected measures which have

<sup>1</sup> *Farrand*, I, 291, and III, Appendix F.

<sup>2</sup> *Essays* LXII and LXIII.

<sup>3</sup> 'No government, any more than an individual, will long be respected without being truly respectable; nor be truly respectable without possessing a certain portion of order and stability.'

a gradual and perhaps unobserved operation'. Only those enjoying the result will care to create its possibility and watch for its advent with concern.

### FRANCE

In France the fury of the revolution against inequalities of all sorts, and the burning, reckless belief in popular sovereignty, overcame both the wishes of some of the *cahiers* and the theories of De Lolme and Montesquieu, which suggested a bicameral system of commons and lords. The ideology of Rousseau was accepted as a true description of the facts of the time: the Constituent Assembly accepted the argument that sovereignty was indivisible and the nation was sovereign, and hence that its representative body could not but be one.

'But the sovereign is one and simple, because it is the collection of all without the exception of even one person; therefore the legislative power is one and simple, the sovereign cannot be divided, because there are not two or three legislative powers any more than there are two or three sovereigns. And, *vice versa*, and consequently, if you divide the legislative power in two or three parts, you divide the sovereign into two or three, a thing which it is not possible for men to do, because they cannot contrive that the sovereign, which is necessarily the collection of all in one, shall be other than the collection of all in one.'<sup>1</sup>

This pedantic eloquence was the necessary consequence of two causes: the need of the revolutionaries to prove that sovereignty lay with the people, and to deny the inequality of men.<sup>2</sup> What possible second chamber could be established save on a basis which admitted that there were *natural* differences among men? To admit this was to return to the principle of aristocracy, which God forbid!<sup>3</sup> This argument is to be found in Sieyès' classic dilemma: 'If the two assemblies agree the second chamber is unnecessary; if they disagree it is obnoxious;'<sup>4</sup> it is developed further in the argument of Mathieu de Montmorency, thus:

<sup>1</sup> *Archives Parlementaires*, 1<sup>er</sup> serie, VIII, 569. The stupid argument of the unity of the national will of sovereignty caused the Republic of 1848 to reject a Second Chamber. Marrast, the reporter of the commission, parroted in his report: 'Sovereignty is one, the nation is one, the national will is one. How, then, can it be desired that the delegation of sovereignty shall not be unique, that the law emanating from the general will shall be obliged to have two expressions for the same thought.' To this point of view the proper answer is that sovereignty, being a quality, can inhere in whatever body or bodies it is put; that the nation is not one, that the national will is a sum and a conflict of particular wills, some very strongly organized. The mere desire that sovereignty shall not be unified, which *does in fact emerge in every country*, is a proof that the national will is an abstraction, and that there is never 'one and the same thought' in every nation or even in any small group bound together by the most intimate ties, for more than a little time. Why should a parliament consist of two or three or four hundred members, if there is but *one* thought?

<sup>2</sup> Cf. Necker, *Le Pouvoir Exécutif dans les grands États*, 1792, p. 68.

<sup>3</sup> It was argued that nobles were made not by the sovereign people, but by the king who had no right to be sovereign.

<sup>4</sup> Cf. Clapham, *Abbe Sieyès*, (1912) pp. 128-131.

'If the two chambers have the like composition, one of them becomes useless, because it can no longer be anything other than a body necessarily always influenced by the other. If the composition is not the same and the idea of a Senate is adopted, it will establish aristocracy and will lead to the subjection of the people.'<sup>1</sup>

A Second Chamber system was suggested by Lally-Tollendal, with the already familiar arguments: to stop too hasty decisions, that a single body would be amenable to non-parliamentary influence, that a senate of elders adds wisdom to decisions, two chambers in agreement have great authority, especially against popular turbulence. These arguments could not prevail.<sup>2</sup>

Since Sieyès' dilemma has been accepted so easily by generations of later students, it ought to be demolished, not because a second chamber may be found to be ultimately unnecessary, but because it is one of those phrases which stop thought by stunning the mind. The answer to Sieyès' dilemma is this: 'If the two assemblies agree, so much the better for our belief in the wisdom and justice of the law; if they disagree, it is time for the people to reconsider their attitude.' Further, he provided otherwise for many checks and balances.

Elemental forces, other than doctrine, swept the members of the Constituent Assembly along. There was, therefore, no second Chamber in 1791. Nor in the Constitution of 1793 was a bicameral system established, but to the electoral colleges a right of challenge within forty days was given.<sup>3</sup>

The Constitution of the Year III showed the result of the terrible experiences through which France had passed and was passing. Terror, intrigues, foreign danger, the dictatorship of the Commune of Paris—of the Mountain—of Robespierre, all pressed the Convention towards any port which promised refuge. The experience of America was now invoked. A '*Corps législatif*' was created, of two chambers, the Lower, the Council of Five Hundred, and the Upper, the Council of the Ancients, numbering 250, the one, the Republic's 'inspiration', the other, its 'reason'.<sup>4</sup> The suffrage was already limited,<sup>5</sup> and both bodies emanated from election, one-third being renewable each year. The Lower House initiated laws, the Upper House had the right of rejection, when the law could not be re-presented until a year had elapsed, but the Lower House could present another law in which the rejected one appeared as a part. Thus the Upper House could provoke amendments.

<sup>1</sup> *Archives Parlementaires*, 1<sup>er</sup> serie, VIII, p. 585, also pp. 580–600.

<sup>2</sup> Cf. Redslob, *Staatstheorien der Französische National Versammlung*, pp. 178 ff.

<sup>3</sup> Cf. Billecard, *De la mode du Recrutement du Sénat* (Thèse), 1912 (Giard et Brière), Paris, p. 24 ff.

<sup>4</sup> Boissy d'Anglas: rapporteur: cit. in Aulard, *Histoire Politique de la Révolution Française* (Paris, 1901), p. 559.

<sup>5</sup> See Duguët et Monnier, *Les Constitutions de la France*, Paris, 1925.

Napoleon dispersed these bodies.<sup>1</sup>

At the Restoration a Chamber of Peers established itself. The Revolution of July broke the hereditary principle, and thereafter the King nominated to the Chamber from among select groups of notabilities, mainly civil, judicial and military administrators, and the eminent among the great *bourgeoisie*.<sup>2</sup> This body was so meek that the revolutionists of 1848 did not bother to disperse it; it was said that had they done so they would have flattered it.<sup>3</sup> The Constituent Assembly of 1848 rejected the bicameral system. The argument on both sides contained nothing new.<sup>4</sup> Were they to return to aristocracy? No. Had the recent experience of notables been satisfying? No. Then 530 against 289 decided for a single body<sup>5</sup>: and significantly agreed to a more settled and deliberate form of procedure for the creation of laws,<sup>6</sup> and the short tenure of three years.<sup>7</sup> Further, a Council of State was established, elected by the Assembly for six years, renewable, one half every three years. This body was to be consulted by the Assembly in its projects for examination previous to discussion.

During the Second Empire a single-chamber National Assembly faced Napoleon III.

We have arrived at the Senate of the Third Republic. What was to be done? France had had a most disastrous constitutional experience. The neatest American doctrines had come to nought upon contact with the realities of character and existing social institutions; and seemingly every argument which had been made on the one side or the other in the perennial controversy had at some time been ridiculed by unexpected events. Two Chambers had been unsatisfactory: one Chamber had been unsatisfactory. . . . The constitution was made, as all constitutions are made, not by the moulding power of pure reason so illuminating that all could accept its direction, but by the power of numbers emergent from the immediate action and counter-action of social forces. The vital fact was that about 400 members of a total number of 630 were monarchical, and were determined that if they could not re-establish a monarchy, they must

<sup>1</sup> Cf. Blanc, *Napoleon I*, Chap. II.

<sup>2</sup> Duguit et Monnier, op. cit., Law of 29 Dec. replacing Art. 23 of the *Charte*.

<sup>3</sup> Billecard, op. cit., p. 31.

<sup>4</sup> Put best by Duvergier de Hauranne (*Moniteur*, 21 September 1848): 'The division of labour is based on two great ideas: the idea of maturity, because it is necessary to resist the attractions of the moment, and the idea of liberty: in fact, a brake is necessary upon a power which constantly attempts to increase and invade everything. What is needed to contain the directive power is not passive immobile obstructions, but living impediments which have an active force always opposing an active force.'

<sup>5</sup> Constitution of 1848, Chap. IV, Art. 20.

<sup>6</sup> *Ibid.*, Chap. IV, Art. 40: A quorum was to be half the membership plus one. Art. 41: Three deliberations at intervals of at least five days for the valid making of a law.

<sup>7</sup> *Ibid.*, Chap. IV, Art. 31.

at least set up institutions into which its spirit might return at a propitious date.<sup>1</sup>

No one has yet made a study of the foreign influences upon the French Constitution of 1875, yet not only the native experience, but outstanding experiments in other countries, have their part in the result. Not that these determine the decision of legislators, but they suggest to them the forms in which their thoughts may run. England's experience with the House of Lords was envied and had, indeed, been the model of the July Monarchy. The House of Lords was then at the height of its prestige: it was not yet attacked by the forces liberated by the Reform Acts of 1867 and 1884. It appeared to represent a national *élite*, an idea very congenial to the French; and, to monarchical Frenchmen, not only congenial but the very essence of political virtue. The steady, regular beat of the English political pulse was contrasted with the feverish vicissitudes of French government. Here, then, was one stream of tendency.<sup>2</sup> Another was that which came from the sister Republic, the United States of America. Not only De Tocqueville, but Laboulaye and others, had eagerly studied American experience. Who in that generation could avoid it? Laboulaye, indeed, Reporter of the Commission on the Constitution, and the inventor of many of its most important clauses, was a keen student of both constitutions—the English and the American—when these were the only two great states with a fairly long and uninterrupted experience of *free* government, and his reports are full of references to it, not as something alien to him, but as something which was of the very texture of his mind. The American Senate had at that time already secured a supremacy over the House of Representatives and, with all its faults, it attracted the better type of legislator. Significantly for the final result in the French Constitution, it was *indirectly elected*, possessed *long tenure*, was subject to *partial renewal*, and the qualifying age of its members was higher than that of the members of the House of Representatives. All these things won their way into the Senate of France; and as we shall see, what may be called the less republican experience of England, was ultimately much less influential although the first projects of the Constitution contained attempts to secure an *élite* based on social or functional pre-eminence.

Further, in his search for the conditions of a durable Constitution for France, Prévost Paradol had pointed to the experience of other countries, especially the United States and England. His book, in its tenth edition, in 1869, said:

<sup>1</sup> Cf. Hanotaux, *Histoire Contemporaine de la France*, Vol. I, Chap. I (for figures quoted) and Vol. II, Chap. IX.

<sup>2</sup> On the origin of the Constitution see Esmein, *op. cit.*, Vol. II, and especially p. 370 ff.; also *Notice Historique* in Duguit et Monnier, *Lois Constitutionnelles*.

'Experience is in accord with reason in recommending to nations which wish to govern themselves with order and liberty, the establishment of two chambers, between which the legislative power is divided, while that one of the two chambers which more directly represents the people exercises ordinarily a preponderating action on the general conduct of affairs. The existence of an Upper Chamber has several advantages: the laws submitted to a double discussion are more maturely discussed; the experience of a certain number of distinguished officials or eminent men who cannot, for different reasons, sit in the other House, is not entirely lost to the public, and, thanks to the right of initiative, important laws and useful reforms can be born in this assembly; finally, this Upper Chamber can offer a solid point of support to opinion and the government, in the case where the other Chamber should inconsiderately abuse its power, and the right of dissolution would seem to be less timidly exercised were the government implicitly encouraged by the approbation and collaboration of this body, to send the other House back to the electorate, to whom belongs the last word.' <sup>1</sup>

As for its composition, there were three possibilities: hereditary in certain privileged families; nomination for life by the sovereign either entirely at his discretion or with certain restrictions; by election in a manner different from that of the Lower House. The democratic State could not accept the first; the second could not be recommended since it would not have the necessary authority, and it implies a monarchy. Election is left; and, in Prévost Paradol's opinion, it is good that this should be based on the local governing bodies. Supposing these (the *conseils généraux*) elected 250 members, the intelligence, the knowledge, the substantial position, and their conservative spirit, would produce a first-class body of the type needed. Election for life would cut them off from touch with public opinion, hence election for ten years should be adopted. Since the Chamber might well have 300 members, the remaining fifty seats could be given as of right to certain high civil and military officers. Thus, then, a place would be made for men useful to the State but not able or willing to run the chances of election to the Lower Chamber.

The Senate was established, by the first of the Constitutional Laws of 1875, as a carefully concocted compromise between the parties of the Left, which were in a minority, and the parties of the Centre and Right (excluding the Extreme Right), brought about by a series of subtle manœuvres.<sup>2</sup> Although it was not the institution the monarchists

<sup>1</sup> Prévost Paradol, *La France Nouvelle*, p. 106.

<sup>2</sup> On the general spirit animating France and the Assembly, nothing, I think, is better than Daniel Halévy's gem-like essay *La Fin des Notables* (Paris, 1929). Thiers submitted a constitutional project, in 1873, in which a second chamber was included. It was composed of members elected for ten years by universal suffrage, but the candidates were restricted to certain categories, of which there were fifteen. This was to transfer to the new State the July Monarchy's Chamber of Peers, but the electorate, not the monarch, was to choose the senators. The monarchists were now caught between the risk of bringing on another revolution if they openly challenged the republic, and having their majority whittled away by Gambetta's radical campaign. Able neither to move, for they were divided as to three different claimants to the throne, nor to sit still, because the republic seemed to

would have liked to get, its very existence was compelled by their numbers in the Assembly, and although the Republicans of the Centre and the Left had obtained concessions and had good reason to be satisfied that their tactics had averted a Chamber of Peers, yet the Senate was not in keeping with their philosophy.

**Composition of the Senate.** Let us consider its composition : it had 300 members : of which 225 were elected by the departments, and seventy-five by the National Assembly. The age-qualification was 40. The elected Senators in each department were elected by a body thus composed : (a) the parliamentary deputies of the Department, (b) the members of the *Conseil-Général*,<sup>1</sup> (c) the members of the *Conseil*

gain fresh strength every day, they became restive : put Thiers on his defence, and dismissed him and his project (24 May 1873. See Lavissee, *Histoire de France Contemporaine*, Vol. VII, by C. Seignobos, Bk. IV, Chap. II).

The next project (by the Duc de Broglie, Catholic monarchist) for a Second Chamber was highly original. The Grand Council was composed of (1) members elected by the local government departments, (2) members *ex officio*, such as cardinals, marshals, admirals, full presidents of the Court of Cassation, of the Court of Accounts, and (3) members nominated for life by the President of the Republic by decree given in the Council of Ministers. The elected class were to be chosen by special electoral bodies composed of at least fourteen categories of officials including the members of parliament for the departments, and the taxpayers paying the higher land and *patentes* taxes. As for the nominated class, they were to be chosen from eight categories of persons (Art. 3. Cf. Esmein, *op. cit.*, II, 30).

This project was rejected because it showed no sign of the strength a Second Chamber ought to have, and which it was considered could be obtained only by universal suffrage to which the monarchists were very hostile, or heredity, which was opposed by the Left. The project offered no possible meeting-ground for these rivals. The Assembly was obliged to do something to end the embarrassment of too many schemes, since the Left was using the deadlock as an argument for a dissolution and fresh elections, which could only go against the monarchists. At last, on the 22nd February 1875, the Reporter of the Commission (Antonin Lefébvre Pontalis) gathered from various suggestions a mixture which appeared capable of obtaining a majority. There were to be 300 members : 200 elected and 100 nominated by the President. The age-qualification was 40. Election was to take place by departments, the electoral body in each of which was to be composed of the deputies, councillors of the departmental and *arrondissement*, and one delegate from each commune, chosen by its council and the highest taxpayers. The tenure for elected members was to be nine years, with triennial renewal. The nominated Senators would come from a list established by the Senate ; the first Senate containing members chosen entirely at the discretion of the President (Law of 25th February. Cf. Esmein, *op. cit.*, Vol. II, and Duguit, *L'élection des Sénateurs*).

The Left opposed the members for life, and rejected the power of the President. Other members of the Assembly demanded a greater power for the President. But time and events were pressing. The groups negotiated. Wallon and Lavergne offered a scheme omitting the electoral privileges of the taxpayers and reducing the numbers of nominated members to seventy-five, took the power of nomination from the President and gave it to the National Assembly for the first Senate, and thenceforward to the Senate itself. The Left was satisfied that so much of the elective principle was included, and it had to concede the life senators : but Gambetta urged acceptance which was demanded by the Centre Right, while the Centre Left obtained a larger representation for certain departments. The Extreme Right could not be reconciled, but the Centre groups accepted the chances offered by the election of Senators by the National Assembly. The project was accepted by 435 to 234. *The whole Senate was to be elected* : but for the time some were to be elected for life, yet most were to be elected by the people, though indirectly.

<sup>1</sup> The *Conseil-Général* is the locally-elected local authority of the Department.

*d'arrondissement*,<sup>1</sup> and (d) one delegate chosen by each municipal council. Election was for nine years ; with triennial renewal. The powers of the Senate were : to control ministries, to initiate and make laws in co-operation with the Chamber of Deputies ; but financial bills were to be presented to and voted by the Chamber of Deputies first. Sessions of the Chambers must be simultaneous.<sup>2</sup> Before we consider the consequences of this manner of composition, and the political results of the powers, we must dwell a little upon the later constitutional history of the Senate, for it suffered amendment in 1884, as soon as the Republic was well established, and the parties of the Left were strong enough to undertake a revision.

It will be seen that the municipal councils were given each the power to send one delegate to the electoral body for the Senate : this equality was intentional : the conservative elements in the Assembly were deliberately placing power into the hands of the village communities. Liberal and Radical opinion is almost always resident in urban centres : the Conservative spirit is to be found in places tucked away from the movements of opinion produced by constant discussion in large aggregations conscious of their united power. When Gambetta said that out of the voting-room in the departments no Senate would issue, but 'the grand council of the French communes', he was not praising the Senate : he was flattering the electors who had the power to make the Senate conservative : and he proceeded : 'By this institution of the Senate, properly understood, properly applied, democracy is sovereign mistress of France.'<sup>3</sup> The harsh fact existed, and is not yet entirely overcome, that the simple law of number was violated by the statutory equality between villages, townships, and the great towns.

Grévy elected, the Republicans triumphant, and the ban on constitutional change over, the Left Republicans set out to destroy life-membership of the Senate, and to redress the balance of the small communes. By this time most of the Left had rallied to a Second Chamber, though they desired revision. Even Gambetta was reconciled !<sup>4</sup> Jules Ferry wanted a modification of its recruitment, '*revision aimable, de gré en gré*'.<sup>5</sup> In the election of 1881 revision played a principal part. The Senate, partially renewed in 1883, gave the Republicans large gains. Gambetta's government declared that division of legislative power was not in contention, and that universal suffrage was the sole basis of French constitutional law. It projected the extinction of life-members, replacing them by Senators elected by both Chambers, and established proportionality in the representation of the Communes. Personal and constitutional entanglements (on the question of whether the National Assembly which meets to

<sup>1</sup> These are the locally-elected local government authorities in the next smaller area of local government after the Department.

<sup>2</sup> Law of the 16th July 1875, Art. 4.

<sup>4</sup> Billecard, op. cit., p. 55.

<sup>3</sup> Cf. Lavissee, op. cit., VIII.

<sup>5</sup> Ibid., p. 56.



revise the constitution can be limited beforehand) caused Gambetta's downfall. But when half the Chamber's term had elapsed, and the new elections were looming in the middle distance, revision was undertaken, the Senate being adroitly won over by the excellent suggestion of Jules Ferry that the law on the organization of the Senate should be de-constitutionalized, whereby the Senate obtained the assurance that in the future it would not be swamped by the Chamber's numbers in a constitutional assembly having for its object an uncongenial change of composition. The composition of the Senate was transferred to an ordinary law.<sup>1</sup> An elected Senator was to replace each deceased life-member. Finally, a certain proportionality was established between the communes in the matter of their representation. In 1919 the number of the Senate was increased to 314, as a redistribution of membership among the Departments on the occasion of the inclusion of Alsace-Lorraine<sup>2</sup> in the French State.

What have been the effects of this mode of recruiting the Senate? It has, on the whole, produced what was intended by the Centre parties: a body, not anti-republican, yet of a conservative nature. Every one of its ingredients serves to produce this result.

**Age and Conservatism.** It has ever been the belief of legislators that age will produce maturity of judgement and obstruct rash innovation.<sup>3</sup> We shall later see in what respects this object has been attained. It is more difficult to show a direct causal relationship between age and behaviour; for there are other causes of the French Senate's deliberate slowness. We cannot isolate the effects of age, but we can say that age is more represented in the Senate than in the Chamber of Deputies. The minimum age is 40; available statistics show that the actual average of Senators is a little over 60,<sup>4</sup> while the Deputies appear to be an average of 50 years of age.

However, if instead of taking the average age of Senators we group them in age classes, we obtain this result:

TABLE II

Age-groups	Numbers in Senate of 1921	Numbers in Senate of 1930
40-45 . . . . .	15	5
46-50 . . . . .	23	14
51-55 . . . . .	56	49
56-60 . . . . .	59	56
61-65 . . . . .	56	65
66-70 . . . . .	59	57
71-75 . . . . .	32	35
76-80 . . . . .	11	17
81 . . . . .	8	7

<sup>1</sup> 14 Aug. 1884. <sup>2</sup> Law, 17 Oct. 1919, relative to Alsace-Lorraine, Articles 9 and 10.

<sup>3</sup> For example, the following countries have a minimum age-limit for members of the Second Chamber: Czechoslovakia, 45; Poland, 40; Belgium, 40; Canada, 30; South Africa, 30; Irish Free State, 30.

<sup>4</sup> Cf. Roustan, *Les Parlementaires, 1900-1914*; *Le Sénat* (pub. 1921); Normand, *Les Avenues du Pouvoir*.

Thus in 1921 considerably over one-half were between 56 and 70 ; more were over 71 than under 50 ; one-third of the total were aged 66 and over ; and the group aged 51 to 70 constituted about two-thirds the entire assembly ; in 1930 the age composition showed even higher numbers in the older age groups.

What truth is there in the popular belief that old age makes for conservatism ? To answer this question it is essential, first, to avoid the use of the term conservatism. It is possible to desire revolutionary changes by gradual means ; it is possible to desire to maintain the *status quo* by energetic activity. Which is the conservative attitude ? This term raises all the difficulties of the difference between means and ends ; let us leave it, observe the effects of increasing age directly, and not as it does or does not support a theory of conservatism.

There are certain usual accompaniments of age : they are marriage, family, profession, experience, and physical change. Marriage produces social caution. The man's usual duty is to provide for two, the woman's to maintain the home. Actions or words might have social consequences disastrous to their common life and, therefore, adventurous thoughts are suppressed, not only in themselves but in others. A further control of the daring comes when a family has to be reared, since the need of immediate self-preservation has been extended to a number of beings incapable of self-protection, yet whose welfare is bound up with the parents' by the strongest of human instincts. Institutions, which earlier seemed to be merely the artificial creation of law, begin to take on the aspect of possessing ' natural ' foundations : property, the conception of a natural *élite*, and a necessary social exclusiveness based thereon, even the righteousness of monopolies of professions, schools, and culture, gradually nourish justifications which earlier would have been vehemently repudiated. I have heard one of our most notable exponents of the career open to the talents openly coveting a privileged position for his child. Then the profession adds another shade of deliberateness and patience to the psychology of age. We learn that there are necessary subordinations, and a nature of material and men which cannot be easily moulded ; that they have quite unexpected ways of escaping from control ; that, indeed, careful consideration must precede intervention. By the age of 40 apprenticeship has ended : that apprenticeship which in every profession, even in business, almost always means putting in more work than the older generation with much less reward. It becomes, as I have observed, the expected portion of those who serve such an apprenticeship, then, to take the higher, more directive and less executive work with the highest pay, in their time as their predecessors did before them. This is their legacy. I have rarely known any one to surrender it, or espouse changes which would involve its loss. But the attitude of mind engendered is important—the

*status quo* has now become good, right, just, and it is improper to alter it. Satisfactory familiar roads and processes, and habits, breed a mandarin aloofness to suggestions for changes of any importance.

Finally, experience in general breeds forethought and a tolerance of existing faults. The world is seen to be so complex and obstinate, unalterable heredity limits and solidifies so much, momentary successes collapse so easily upon the passage of the instant of enthusiasm, that the reformer begins to see that he may actually kill himself by the expenditure of his forces of persuasion and service, and achieve but little. Resigned to progress by compromise, he loses the count of years and begins to think in terms of generations. Often disillusioned by apparent successes, he suddenly realizes that *plus ça change plus c'est la même chose*: and the conservative proverbial wisdom of the race takes on a deeper significance. When it does, whether it is in bitter regret, or in a state of fiery conversion, he has become one of the elders of the tribe, thinks twice about the enthusiastic plans of the inexperienced, is dubious, hesitates, temporizes, purses the lips, offers objections, is 'full of wise saws and modern instances'; in short, is full of warnings to be careful. Jouvenel says: '*Un sénateur est un député qui s'obstine.*'

Lastly, there are certain physical changes, easily observable in the appearance of the old, such as baldness, greyness, a shrivelled skin, excessive ponderosity in some, and fragility in others, but as yet only partially observed in the glandular processes and structure. Modern biology has, unfortunately, little to say on the connexion between internal physical change and the effects upon mentality and outlook, but these seem to be its main conclusions, that there is a special slowness in reaction to stimuli, a desire for rest, a weakening of the memory, a greater unwillingness to undergo the pain of breaking with habits which are as much physical as mental.<sup>1</sup>

\* \* \* \* \*

Whether the main cause is to be found in experience or physical change, there is no doubt that legislators act rightly in establishing a higher minimum age for senators than for members of the Lower Chamber, if their intention is to secure conservatism; but the gap in age must be large, at least a score of years. Yet there is no exact corollation between age and conservatism either in each case or in general; and it must be remembered that the age of members of the Lower House is apt to be rather high.

**A Long Term.** Election is for nine years. The Senator need not be constantly concerned for the views of the electors, and though many strokes of his authority may be unpopular in nine years,

<sup>1</sup> Cf. Stanley Hall, *Senescence*; H. Rolleston, *Old Age*; Berman, *The Glands Regulating Personality*.

they will be forgotten ; nor is he, like the deputy, compelled even at intervals of four years to prepare an electoral profession of faith. Now it is impossible to argue directly from this duration of the mandate to conservatism : the better generalization is that the Chamber of Deputies and the Senate are never in exact accord in their opinions, since each has been constituted by different states of mind in the country. A Senator at the end of his term is already five years behind a contemporary Deputy at the end of his : and there is nine years' difference between the end of a Senator's term and the beginning of a Deputy's. The distance is even greater, for the Senator does not owe his election to an immediate canvass of the people, but to bodies who themselves may have been in office three or four years. But this is an eternity. We know that in social legislation in particular, our time moves rapidly, and we know also that where popular election exists, even the most conservative political parties have been obliged to outbid the progressive parties. We can safely conclude that the nine years' term, together with the leeway in time contributed by election by elected bodies, accounts for the divergence of opinion between the two Chambers. That is not all. There are important 'landslides' of votes for the First Chamber from one election to another. These affect the composition of Groups and Cabinets ; and it is upon, often, a subtle difference in composition, to the extent of a few votes, that differences between two elected chambers depend. Only by a rare accident, then, is there a coincidence of strength in the Chamber and the Senate. The normal condition is dissonance ; and the *method* of election of the Senate, together with the weakness of party organization in its elections, aggravates this dissonance. But this does not always mean the conservatism of the Senate and the progressivism of the Chamber : it means only dissonance, and sometimes the Senate, as between 1920 and 1930, may be on occasion (during the time of the *bloc national* and since 1924) more liberal than the Chamber.<sup>1</sup> Until the War, however, it was more conservative.

Nor is that all. Senators are frequently re-elected, as of course, and some serve for very long periods, as Table III on page 694 shows ; with two results, to increase the distance in opinion between the Chamber of Deputies and the Senate, and to enhance the knowledge of affairs and prestige of the latter.

The Senate derives from *indirect* election : the public at large has little contact with the Senator. The bodies which elect are small compared with the open constituencies of the Chamber of Deputies, and they are scattered—a handful in a large area, an average of some-

<sup>1</sup> Cf. Barthélemy, *Le Gouvernement de la France* (1919), p. 67, and compare the defeat in December, 1930, of the Tardieu ministry which was not upset in the Chamber of Deputies.

TABLE III

THE SENATE OF 1927. NUMBER OF TERMS PER SENATOR

1st Term	.	.	.	.	.	.	.	.	.	116
2nd "	.	.	.	.	.	.	.	.	.	147*
3rd "	.	.	.	.	.	.	.	.	.	36†
4th "	.	.	.	.	.	.	.	.	.	12‡
5th "	.	.	.	.	.	.	.	.	.	3‡

\* Twenty-three had served for less than four years (owing to re-election); only eighteen had served more than nine years.

† Only twenty-one had served more than eighteen years.

‡ Only two had served for more than twenty-seven years.

thing over one thousand.<sup>1</sup> They are men of some experience in government themselves, acquainted with the arts of electioneering. There is, therefore, no question of crowd-rhetoric or the undue predominance of the desirable over the possible. As a rule speeches will be made to the electoral body assembled, only on the actual day of the election, and then, in turn by the various candidates. Their experience, in fact, tends to make them more conservative, more official-minded, and negating, than the ordinary conservative citizen. Eminence of a kind is required; there must be more than the average qualities which impress the average voter; and persons elected in such wise and on such assumptions are certain to insist upon their power and dignity. The campaigns of a Senator are restrained, and continuous; as a Mayor, or Departmental Councillor himself, or as a deputy or, already a senator, he gets little favours for the communes, is festive and generous with the kind of treating which cannot be brought home on so considerable a scale and so directly that the election will be invalidated, and since the electoral body is comparatively small, all, or at least the more influential, can be personally canvassed. Each vote is very important in such a body. An absolute majority is necessary to election: and on the occasion of second and even third ballots, the manœuvres and intrigues offer an extra entertainment, *vin compris*.

**The Senate's Constituencies.** That constituent of the Senate which gives it the surest proclivity towards conservatism is the distribution of votes in the electoral bodies. The composition was revised in 1884 in order to avoid the predominance of the small rural communes. But parliament was not prepared to endow radicalism with more power than could be helped. In other words, they chose a way between, putting the greatest power into the command of the townships of between 4,000 and 5,000. This is easily seen from the distribution:

<sup>1</sup> E.g. in 1927, the smallest was Alger, with 280 delegates from the communes, and 33 of the other classes of electors; in Hautes Alpes, 276 and 58 respectively; in Gironde, 1,187 and 120; and Nièvre, the largest, 2,346 and 160. (Cf. *Revue Générale d'Administration*, 1927.)

to the departmental electoral body the communes send delegates thus :

TABLE IV

Population of Commune	Number of Municipal Councillors	Delegates
Below 500 . . . . .	10	1
500-1,500 . . . . .	12	2
1,500-2,500 . . . . .	16	3
2,500-3,500 . . . . .	21	6
3,500-10,000 . . . . .	23	9
10,000-30,000 . . . . .	27	12
30,000-40,000 . . . . .	30	15
40,000-50,000 . . . . .	32	18
50,000-60,000 . . . . .	34	21
60,000 and above . . . . .	36	24
Paris . . . . .	56	30

Thus no place may send more than twenty-four delegates, save Paris. But any commune with over 60,000 inhabitants and more has only four times as many delegates as communes with between 2,500 and 3,500 inhabitants, and not quite three times as many as places between 3,500 and 10,000. For larger rises in population from 2,500 and upwards there is only a uniform increase of three delegates per stage even where that is as many as 20,000 (at the point 10,000 to 30,000). Barthélemy has shown, statistically, how unfair this method of election is, judged by the principle of the equality of voters. Lille, for example, has 216,000 inhabitants and sends twenty-four delegates, while twenty-four villages near it have, together, 4,000 inhabitants and send twenty-four, and this with the twelve contributed to by twelve places with 6,600 inhabitants, causes Lille to be quite outvoted. Of 945 senatorial electors in the Department of the Seine Paris has but 110. The writer says that this has resulted in the predominance of about 75,000 (the total number of senatorial electors) middle *bourgeoisie*, officials, proprietors, merchants and manufacturers of middle-class status, publicists <sup>1</sup> (compare the Table on page 657), and its adversaries have been able to say that it constitutes an assembly without the principle of life and without a sense of authority. Hence the importance which French politicians attach to the municipal and departmental local elections : hence also the special attention paid by Socialists and Radical-Socialists to the municipal authorities. A not severe critic of the Senate has said of its general composition, and we think with special reference to the distribution of elective power : ' It is not a logical and harmonious scheme at all, the product of a political conception, the application of a principle : it is the fruit of a compromise between opposed theories, the result of an empirical trans-

<sup>1</sup> Barthélemy, *Les Résistances du Sénat*, Revue du Droit Public, 1913. Other figures and facts to the same effect are given in Billecard, op. cit., p. 84 ff.

action.'<sup>1</sup> There are parliamentary critics also who have blamed the Senate's derivation for its slowness in economic and social legislation.<sup>2</sup>

Nor can we omit the stabilizing effect of partial renewal of the Senate; this means (allowing for re-election of old members) that one-third the number issuing from fresh election have to meet two-thirds who are already organized as a body and possessing an assurance which it requires much time to gain. The new-comer is inevitably put into a position of comparative weakness. Further, in comparison with the Chamber of Deputies, the Senate gets quicker to work: for at a full renewal of the Chamber several months are lost in acquiring the rudiments of organization and instruction.

**Deputies become Senators.** Now, since the Senate has such a long tenure, enjoys the same parliamentary salary as the Chamber of Deputies, offers quite as good a social life in the capital and almost as much enjoyment of power, without the need for careful attention to a large constituency, requires no tremendous exertion, even when that is mainly vocal, nor electoral expenditure, it is not surprising that it attracts members from the Chamber of Deputies. Indeed, the Senatorship has become the national rounding-off of a parliamentary career; to go to the Senate, if not to be a minister, is looked upon as a promotion and, in fact, the deputies spend much of their efforts upon preparing a way to the Senate. In 1912, for the 100 seats then falling vacant, sixty of the candidates were Deputies; while twenty ex-Ministers then sat in the Senate. In 1910 thirty-two ministers and ex-ministers were Senators; in 1919, thirty-eight; in 1925, forty-six; in 1928, as many as fifty-two. In 1930 ninety-five of the sitting Senators had been Deputies; and thirty-seven had been Ministers; and six had been Prime Ministers. The consequences of this are obvious. The Senate is a body which does not submit to the threats of the Lower House; it has an experience of business surpassing that of its colleagues; it is envied, and therefore powerful in negotiation. It is true that the passionate belief in universal suffrage takes away from its authority compared with that of the Chamber of Deputies, that the flame of democracy burns more fiercely there, but in so far as any other body can damp and control this flame with authority, the Senate can. For not only is it so largely composed of men who have been through the first stage and know when the bluff may be called, but it can and does insist that it is an emanation, if a more remote one, of the people. And even with all the distance between the Senate and the electorate, the argument is difficult to counter. The electorate are waiting outside for the Deputies; they dare not come empty-handed, and therefore the Senate can force the Deputies to pay a tribute to them in terms of concessions in policy: better concessions than frustration.

<sup>1</sup> Billecard, *op. cit.*, p. 68.

<sup>2</sup> Cf. Billecard, *op. cit.*, p. 82.

Further, its origin in electoral colleges consisting mainly of local government councillors makes Local Government itself a channel of access to the Senate; thus, in 1930, 137 Senators had been Councillors-General (i.e. of the Department), 104 had been mayors of communes.

The Senate, then, has a constitution which gives it a curbing, deliberate, decelerating bias, and the substance as well as the consciousness power. Whether it is more conservative, or for the time more liberal, it is different from the Chamber. To see it at work is to realize that its calm is not so much the calm of old age, though grey heads abound, as the calm of assured power and academic indifference to popular outcry, even though that power be not as great as its members might, perhaps, like or fancy they possess. For, there, beyond the Chamber of Deputies are the people, and distantly, but at times unmistakably, the insistent voice can be clearly heard.

**The Powers of the Senate.** What are its powers and how has it used them? Apart from its position as a high court of justice,<sup>1</sup> the Senate's constitutional powers can be divided into three separate functions: the partial or total revision of bills emanating from the Chamber of Deputies and the initiation of bills<sup>2</sup>; co-operation in finance bills which must be introduced in the Chamber of Deputies<sup>3</sup>; and control over the government.<sup>4</sup>

Now these are powers of real moment and they have been exercised with decision and effect. For the ultimate fact is that the Chamber of Deputies has no power to compel the Senate to send back its bills in the shape it desires unless it can persuade that body that the electorate is, by a majority, continuously favourable to and even insistent upon its policy, or unless it can throw over into the Senate the grappling-irons of party. It has only been possible to do the first after the lapse of something like a decade from the original introduction of a bill, and as for the second, Party, which means so little in the definition of attitude in the Chamber itself, *this has not succeeded in establishing a discipline which will cause Deputies and Senators to march along a common legislative route.* Even a small disparity between the strength of the parties in both chambers—ten votes in one or two groups—may do all the damage. No government can, therefore, be sure that the Senate will not reject or mutilate its bills, none can be sure that when its administration satisfies the Chamber it will equally satisfy the Senate. Further, owing to the fact that the Senate has not relinquished its power to reverse governments, and owing also to the strong element of individual careerism in French politics, Senators are ready to join Ministries not supported by the rest of their party. Yet such a

<sup>1</sup> Law of 24th February 1875, Art. 9 and Law of 16th July 1875, Art. 12, para. 3.

<sup>2</sup> Law of 24th February, Art. 8, para. 1.

<sup>3</sup> Ibid., Art. 8, para. 2.

<sup>4</sup> LAW of 25th February, Art. 6.



ministerial Senator has no power to get the government's bill accepted, for he has no party supporting him. The picture which the party relationship of Senate and Deputies presents, then, is this : a series of groups in the Chamber of Deputies not firmly tied by agreement upon policy, but associating and falling apart on issues of the day.

Now in other countries, in the U.S.A., as we have shown, and in Australia, where Senates exist, a real duality between the two chambers is overcome by the agency of party organization : the electoral fight is fought in common, or as in Canada, the ruling party nominates enough members to overcome the nominees of its predecessors.<sup>1</sup> Some duality may yet exist, because no two bodies of men sitting separately, endowed with real power, be it never so small, and having even the smallest diversity of composition, produce the same legislative result. But such duality is not insuperable, or at least, it is superable in a comparatively short time. The duality of the legislative assembly in France cannot be overcome easily, or in a short time : for it reposes upon a basis of group independence so strong as to be almost indistinguishable from personal independence ; and this personal independence is of such a quality in the Senate as to be readily converted into that kind of group-esteem which is eager to make its authority felt—in this case, as a spirit which almost always denies.

There is very little, then, to bring the Senate into consonance with the Chamber : only the existence of a strong government, its long persistence in a policy, and the clear verdict of the polls <sup>2</sup> at recent elections of the Chamber and the Senate can do this. And there are cases like that of the fight for electoral reform until 1913, and of women's suffrage until the present day, where no effective consonance has been possible. But we must not forget that French Cabinets contain on an average three or four members (in a total of about twelve), from the Senate.

**Ordinary Bills.** Let us see how the Senate works in each of its three main functions. In regard to ordinary bills the Senate operates with a system of procedure similar to that of the Chamber of Deputies : the principal element of which is the reference of all bills to one or other of a series of Parliamentary Commissions, no decisive debate being possible until the Commission has reported. All, then, depends upon the power of the Senate to compel its Commission to report in a reasonable time, and the power of the Chamber of Deputies to cause the Senate to bring the matter to debate and decision. The Chamber of Deputies has no legal power to compel the Senate to

<sup>1</sup> Cf. Mackay, *The Unreformed Senate of Canada* (1926), Chap. IX.

<sup>2</sup> Relatively, of course, to French conditions. I am conscious of the disillusioning and disconcerting realities latent in this customary phrase.

proceed to the discussion of a bill.<sup>1</sup> It has only the psychological power of demonstrations in the Chambers and the country, and the influence of those Ministers, perhaps the Prime Minister himself, who belong to the Senate and can exert it.

Further, Ministers, whether members of the Senate or not, have the right to speak in both Chambers. The extent to which the Chamber of Deputies can, in default of the power to compel the Senate to apply itself, cause its impatience to be known, has been settled by the procedure and rules of both Houses. It has no power directly to criticize the work, the procedure or the members of the other House<sup>2</sup>: but it may pass resolutions begging the government to urge it onwards. Pierre sums up the experience of the Chamber of Deputies in regard to attempts to praise or blame the Senate in a manner which makes very plain the gulf between the Chambers:

‘The mechanism established by our constitutional laws would be falsified if each of the assemblies which divide between them the legislative power did not deliberate in full independence, if the acts of the Senate or of the Chamber could at any time be cast into the balance of the votes of the Chamber or of the Senate. For the assemblies as for individual persons, there is an interior as well as an exterior court of conscience. In the interior one, Senators and Deputies can place whatever importance they wish upon projects which have been introduced or resolutions passed in a body other than that in which they sit. In the exterior court the Senators and the Deputies must regulate their conduct entirely according to the manner in which they conceive the public good. The balance of power would be upset if arguments drawn from the attitude or resolutions of one House were used in the parliamentary debates of the other; one would cultivate the habit of voting by complaisance or by hostility, instead of voting in the sole interest of the community.’<sup>3</sup>

Hence great care is taken to prevent the two Chambers debating a subject simultaneously, or debating a fresh resolution synonymous or nearly synonymous with the bill sent up, between the time when it is transmitted to the other assembly and the time it has been debated and decided.

However, the Chamber has acquired the power to press the Senate, by resolutions of this nature: ‘The chamber, *the issue of universal suffrage*, faithful to the principle of the representation of minorities affirmed by its votes of 5th July, 1911, and 1st July, 1912, and rejecting any adjunction thereto, adjourns until Tuesday.’<sup>4</sup> ‘The rule that one assembly cannot harass the other by debates on the same subject

<sup>1</sup> Cf. Pierre, *op. cit.*, III, 1009: ‘The right imparted to each assembly of rejecting a proposition or a project of the law adopted by the other assembly is not limited by any constitutional or procedural text; in consequence, a project often voted by one of the two Chambers can be indefinitely repulsed by the other.’

<sup>2</sup> *Ibid.*, Vol. I, para. 681.

<sup>3</sup> *Ibid.*, pp. 826, 827.

<sup>4</sup> This resolution was not, however, allowed or transmitted, on the ground that the Senate had begun but not yet finished its deliberation on the projects or propositions of law.

as those under its consideration is overcome by resolutions, which can be debated, apparently directed to the government, but in reality intended to impress the other Assembly. Thus: 'The chamber invites the government to sustain before the Senate, in the matter of the personnel of workers and employees of the railways, the solutions which approximate closest to the votes already given on several occasions by the Chamber of Deputies, especially that of the 14th November, 1901.'<sup>1</sup> It may also urge the Senate to *continue* its good works, lest it fall from grace, as: 'The Chamber, *adhering* to the principle of the proposition made to the Senate and already favourably received, etc., etc.'<sup>2</sup> The Chamber may be more urgent: 'The Chamber invites the Minister of Agriculture to intervene before the Senate to put on its order of the day the law voted last April.'<sup>3</sup> 'The Chamber counts on the Government . . . as soon as possible . . .' But the Senate 'is an independent mistress'<sup>4</sup>; and again and again its 'redoubtable courtesy', as M. Viviani has called it, has overcome the querulousness of the Chamber and sent its bills into the no-man's-land of a Commission, whence the only dispatch concerning them is, 'missing'.

If the Chamber of Deputies has no power except agitation, which is not of great avail, to worry the Senate, that body as a whole is not organized to cause its own Commissions to report quickly. The Rules of Procedure of the Senate allow a maximum time of six months<sup>5</sup>; three months is given for bills modified by the Chamber and returned to the Senate. After this time any Senator may demand that it be put on the order of the day, and the usage of the Senate is to count the lapse of time from the date when the Commission can actually begin its work. But since no Commission can be expected to attend to everything that comes before it, owing to the large number of projects presented, the Senate has a good opportunity, which it has amply used, quietly to let these projects die. Until 1903 there was no term at all for the reporting of bills, and indeed, the theory was that since the Senate was a revising chamber, it would be unwise to attempt exactly to mete out the time necessary to examine laws which might raise grave political problems; and that it was sometimes prudent to allow bills which had first met a warm welcome to slumber in a Commission.<sup>6</sup> The change is important, and it seems to show two things: the effect of increased need for statutes, and the results of increasing democratization, if we may so call it, of the Senate, through

<sup>1</sup> Pierre, *op. cit.*, Vol. III, para. 1015.

<sup>2</sup> *Ibid.*, para. 1014.

<sup>3</sup> *Ibid.*, para. 1016. This of a law sent up four months before.

<sup>4</sup> *Ibid.*, para. 1019.

<sup>5</sup> *Règlements*, Art. 63; cf. Bonnard, *Les Règlements des Assemblées Législatives de la France*, Paris, 1926.

<sup>6</sup> Pierre, *op. cit.*, I, 786.

the growth, though slow and fragmentary, of political doctrine. We shall see that in the matter of finance bills the relations between the two Houses are rather different, owing to the urgency of the Budget.

Thus the Senate has not allowed its constitutional right of revision and rejection to lapse, and has found forms in which they could be exercised quite effectively with the minimum appearance of aggression. It has even converted a power originally used only for financial bills, which contain so many unwise and disconnected clauses into a weapon for dealing with ordinary bills. It is the method known as 'disjunction'. The obnoxious clauses of a bill are simply disjoined from the text by the Senate: they are not commented upon, but are ignored: thus they are neither accepted, rejected, nor amended. Disjunction is, to get below the surface of these words, rejection by evasion.

**Deadlocks.** The Chambers have, of course, set up a regular mode of consultation upon the rejection or amendment of a bill by the other House. Those arrangements exhibit no other principles than those we have already discussed on the general theme, that the Senate and the Chamber are both 'independent and mistress'. There is no appeal to the people as in Australia,<sup>1</sup> no possibility of changing the balance of power, as in Canada, by appointments. The only Chamber which may ever constitutionally be dissolved is the Chamber and not the Senate. Projects pass from one Chamber to the other until agreement is reached and the bill dies; or, very rarely, there are mixed commissions to arrive at a common text.<sup>2</sup>

To what effect has the Senate used its powers in ordinary laws? Private members' bills have hardly seen the light of day once they have been handed over to a Commission. Great governmental measures have been fully amended and rejected and this in a particular direction which we may, remembering the distinctions established in the analysis of party policies, call conservative. Thus the Senate retarded the projects for the weekly holiday for workers, for reducing

<sup>1</sup> Provided that three months have elapsed between the first and the second rejection (or unacceptable amendment) of a Bill by the Australian Senate, the Governor-General may dissolve both Houses (63 & 64 Vict. c. 12, s. 57). If, after the elections, the Houses fail to agree, the Governor-General may convene a joint session to consider the disputed Bill.

An absolute majority of the total membership (of both Houses) is required for the incorporation of any amendment in the Bill; a similar majority must be obtained before the Bill can receive the Governor-General's assent.

No penal dissolution can be incurred within the last nine months of the term of the Lower House.

In 1914, at the request of the Commonwealth Prime Minister (Cook), the Governor-General granted a double dissolution. The latter's action was strongly criticized as being contradictory to Australian constitutional practice. Three applications had been refused on previous occasions because the Governor-Generals had considered that great efforts should be made to form an alternative Government. Cf. Keith, *Responsible Government in the Dominions* (1928), I, 431 ff., 137 ff.

<sup>2</sup> For details see Pierre, I and III, para. 676.

the legal hours of labour, workers' pensions, State railwaymen's pensions, income-tax, proportional representation; it has sternly rejected women suffrage, projects for taxes on business, rent restriction, and was adamant against the recognition of civil service syndicates. It has been consistently more nationalist than the Chamber.<sup>1</sup>

**Finance Bills.** The financial powers of the Senate are just as important as its power in ordinary legislation except that it has no right of initiation, a power which, as in every democracy, is reserved to the Lower House. The priority of the Chamber is proclaimed in a formula so obscure as to have proliferated controversies insoluble despite fifty years' discussion. As the most eminent of all French constitutional lawyers and political scientists says—the real question is not one of the interpretation of the text, but a question of political and social power (*force*).<sup>2</sup> The text runs: 'The Senate has, concurrently with the Chamber of Deputies, the initiation and the confection of laws; however, financial laws must be, in the first place, presented to the Chamber of Deputies and voted by it.'<sup>3</sup> This only means, argue those who want a powerful Senate, that *priority* alone is given to the Chamber, but *not decisive power*: the Senate has a complete amending power—authority to amend so severely as to reject, or entirely to remodel. Further, the elective origin of the Senate gives it a right which perhaps might not be accorded to non-elective bodies. Jèze points, however, and in our opinion quite properly, to the fact that its mode of election gives the advantage to the propertied classes. This causes a large opposition not to trust its manœuvres, and certainly not to accept its economic and fiscal doctrines. Nevertheless, the Senate has obtained a great deal of power owing to its history and actual composition. From being monarchist it has become the defender of republicanism against other forms of rule, and the repetition of the *Seize Mai* has never occurred. Again, as we have already shown, Deputies and Ministers have found their way into the Senate: consider such names as Bourgeois, Méline, Dupuy, Clemenceau, Ribot, Pichon, Poincaré, Barthou, Doumer, Laval, Leygues. Finally, as we shall have occasion to show more amply later, and as we have already shown by an analysis of its composition, the Chamber of Deputies is not to be trusted alone in matters of finance—it has not the *expertise* or the self-control to make a proper budget in the proper time. Naturally, when the Senate is obstinate, the Chamber usually gives way,

<sup>1</sup> Since 1920 the Senate has rejected a Women's Suffrage Bill on 21 November 1922 and also a bill of minor importance, creating an unpaid High Commissioner to deal with housing. The Senate's rejection consisted in a refusal to consider the Bill on the grounds that the post was unnecessary (*Sénat, Débats*, 29 December 1925).

<sup>2</sup> Jèze, *Le Budget*, Paris, 1922, p. 241.

<sup>3</sup> Law of 24th February 1875. Art. 8. 'Le Sénat a, concurremment avec la Chambre des députés, l'initiative et la confection des lois.—Toutefois les lois de finances doivent être, en premier lieu, présentées à la Chambre des députés et votées par elles.'

for it is not strong enough in the country, and knows it, to insist successfully. More, Governments have not seldom induced the Senate to insert or omit appropriations which the folly of the Deputies, not held in check by suitable rules of procedure, has mishandled.<sup>1</sup>

The Senate has, therefore, acquired important financial powers, and they extend not only to the actual budget but to laws with immediate financial consequences—as customs laws, laws imposing any kind of taxes, or regulating loans. The rule does not include laws *causing expenditure*, and thus the Senate has a power to initiate such legislation.<sup>2</sup> In financial laws other than the budget, the Senate has complete rights to modify the projects of the Chamber, that is, it may accept, reject, reduce, or increase the credits voted by that body. For example, in 1920 new taxes were created by the Chamber: the Senate seriously amended the bill in order to cause the budget to balance as soon as possible. The tax most affected was the income tax, which is one of the chief sensitive spots in politics. The Chamber of Deputies, through its Commission of Finances, protested, and attempted to lay down a ruling upon the power of the Senate. It conceded the right to reject any expenditure, and the right to reject any tax which appeared excessive. *But it had no right to substitute its initiative* for that of the Chamber or the Government in order to vote increases of any expenditure or taxation.<sup>3</sup>

The Senate seized the opportunity to vindicate its rights. Its protest is of first-class importance:

‘It has been maintained that the Senate has gone beyond its powers in increasing a tax voted by the Chamber. Not only do the constitutional laws assert nothing of the kind, but jurisprudence, more rigorous than the texts, has never reduced the financial prerogative of the Senate to this point. It would be to demand, in fact, that the study of the tax laws and the modifications they might undergo should completely escape the Upper Chamber. The importance and the complexity of the laws require that they shall be submitted to the free deliberation of the two Chambers. That is what always happens. It is necessary to-day more than ever, for there cannot be too much labour or ability of *all the representatives of the country*<sup>4</sup> to bring to the budget the considerable resources of which it has pressing need and to divide the burden equitably among the body of taxpayers.’

That which has been affirmed hitherto, with the exception of the voting of credits, which is not now under dispute, is that the Chamber

<sup>1</sup> Pierre, *op. cit.*, I, 605; Jèze, *op. cit.*

<sup>2</sup> For a more detailed discussion cf. Schwartz, *Des droits du Sénat français statuant en matière de lois de finance*.

<sup>3</sup> Report, 9 June 1920, C.D. No. 1032, and Chamber debate of 15 June 1920, *Journal Officiel, Débats*, p. 2134—where it will be seen how little the Chamber appears to care for its right. A discussion of this kind in England would have been one, not only of first-class political importance, but it would have raised the issue of the constitution, although the country has no constitution.

<sup>4</sup> *My italics*. Observe the insinuation that the Senate has a mandate from the country at least on a par with that of the Chamber!

of Deputies has the initiative in the matter of taxation-laws, and that the Senate cannot transform a tax voted by the Chamber 'in such a fashion that it becomes in reality a new tax affecting taxpayers other than those included in the text of the Chamber of Deputies'.<sup>1</sup> There are no other restrictions upon the Senate's rights regarding fiscal laws.

'The moment seems really inappropriate for an attempt to make any other interpretation prevail. Who can to-day maintain that the Senate has all rights of maintaining or aggravating the financial situation of France, but that it cannot do anything to remedy it? . . . Let us not insist, let us cease this obsolete controversy which has no chance of success.'<sup>2</sup>

This report was drafted by Doumer and, having regard to his financial ability and substantial political talents, not to add his fine character,<sup>3</sup> we can understand why, when such men are in the Senate, the Chamber cannot win its way, and makes concession after concession to Senatorial claims. However, this position, not yet so secure that it does not need assertive vindication, was not easily won, and it has been the subject of a battle in which the fortunes have swayed now to this side, now to that, since 1875. It has favoured the Senate: but the issue is still open.<sup>4</sup>

In regard to the budget the battle proceeds. How far can the Senate increase appropriations or suppress them? Before 1878 the Senate was in a strong position: it was new, and republican feeling had not yet manifested any clear distrust.<sup>5</sup> Its powers were fully used. After the events of the *Seize Mai* its power decreased and that of the Chamber was in the ascendant, and the Senate never persisted when the Deputies refused its measures. The revision of 1884 suppressed the life-members, and increased the republican basis of the Senate, and its power began to increase. It was given a decided stimulus by its staunch republicanism during the Boulanger crisis of 1889 and the Déroulède incident at the end of the century.

The partisans of the Chamber of Deputies have invented the phrase that this body has, or ought to have, 'the last word',<sup>6</sup> and on solemn occasions men like Gambetta, Ferry and de Floquet have

<sup>1</sup> This is quoted from Pierre, *op. cit.*

<sup>2</sup> 18 June 1920, Sénat, *Documents*, No. 250.

<sup>3</sup> Some account of Doumer is given in *Ceux qui nous menent* (anon.), (Plon), 1922.

<sup>4</sup> Senator Milan says (*Revue politique des idées et des institutions*, 30 Jan. 1926, p. 60): 'We think that the right of amendment cannot be limited and that the Senate within the frame of the project of law sent to it by the Chamber, can vote the dispositions which it thinks good in the public interest, provided that it never passes beyond the objects of the bill.'

<sup>5</sup> Its reporter of the Budget Commission (21 Dec. 1876) was perfectly clear that the Chamber of Deputies could not persist against the will of the Senate (Pierre, *op. cit.*, I, 596).

<sup>6</sup> E.g. Pierre, *op. cit.*, I, 595 (though I do not mean to say that he is a partisan of the Chamber): 'En droit la question n'a jamais été résolue. Elle l'a été en fait parce que l'on a appelé "le système du dernier mot". Pour le comprendre, il faut suivre la difficulté depuis son origine.'

enunciated it.<sup>1</sup> The Senate has never admitted this, and the annual battle between the two Houses is settled not by this claim, although the Senate is conscious of it, but by a contest of wills based upon the immediate political situation. The most interesting psychological phenomenon in this frantic annual struggle is the courteous assurance of both sides that they are pursuing a policy of harmony. The strategy of the Chamber is naturally to send the bills up late in the financial year, and thus throw upon the Senate the onus of not voting the budget in time. The Senate does not entirely allow itself to be thus intimidated, and proceeds with its work at its own pace, though that pace is quickened by the necessity which operates equally upon both Houses, that of voting the appropriations and ways and means before the old laws run out. One other condition follows from the relations between the two Houses in matters of finance. The Government is perennially burdened with the need to secure ultimate agreement between them. This is one of the hardest tasks of the French Cabinet. It may have had its appropriations amended in the Chamber by the Opposition or by its own members, by reason of their different policy or because they desire to indicate disapproval of a certain minister. It takes refuge in the Senate, which may overturn the decision of the Chamber. Then it has the onerous task of bringing the Chamber into agreement with the Senate. Or there may be real differences of fiscal theory between the Chambers: the government must somehow, by ways almost always devious, secure that theory or no theory, the appropriations and the taxes shall be voted. The task is made the more difficult because, following the French constitutional tradition, the fiscal initiative of private members is permitted to a degree incredible in England, and rules of procedure are weak because the tradition of the freedom of the private member is still strong. From all this it will be realized that the position of the President of the Finance Commission of the Senate is on a par with that of the Cabinet Minister. He often, in fact, holds the Minister of Finance in his hands.

**Control over Administration.** We come to the third of the Senate's functions: its control over the administration which is exercised through the medium of its control over the ministry. Its authority is derived from the Constitution which says <sup>2</sup>: 'Ministers are collectively responsible before the Chambers for the general policy of the government and individually for their personal acts.' On a number of occasions the Senate has been able to enforce its will by the threat to use the power implied in this clause, and sometimes it has actually overthrown governments. If the power has rested it has never

<sup>1</sup> Ferry, in Government project, 24 May 1884. Gambetta, Revision Bill, 14 Nov. 1881: 'The Chamber of Deputies makes the law in the last resort, says *yes* or *no*, accepts or rejects, but this vote is without appeal and cannot be overturned.'

<sup>2</sup> Law of 25 Février 1875, Art. 8.



sleep; it is always one which governments must take into their calculations. It gives the Senate the sanction requisite for the insistent claims of its Commissions to question Ministers and officials, and even to arraign them. True that Ministers appear less often in the Senate than in the Chamber; true also that the Prime Minister is but rarely a Senator; but a power does reside in the Senate and Ministers cannot reduce their presence beyond a safety line—and, further, a Senator is usually made *Garde des Sceaux*, which office carries with it, conventionally, the Vice-Prime Ministership.

The early republican chiefs like Gambetta and Ferry had emphatically enunciated the doctrine that only the chamber had the right to cause a Ministry to resign. The question came to a head in 1894, in an interesting situation. The election of 1893 had caused a defeat of conservative groups and a large victory for radical and republican (that is, the Liberal-Conservative) groups. But the situation of the Chamber and the country caused considerable parliamentary difficulties. Attempts to govern with centre groups or liberal groups failed, owing to the strength of the radicals and the socialists. These in common sought to obtain a progressive income tax, while the socialists sought to safeguard anarchists and socialists who were then urging the 'propaganda of the deed' from too rigorous prosecution. The Senate, full of conservative elements, was profoundly disturbed. Then a bomb was thrown in the Chamber of Deputies, and Carnot was assassinated, and Casimir Périer forced to resign the Presidency by reason of a virulent personal campaign against him in the Press and at meetings of the Extreme Left. A petty judge was removed from his duties by the Minister of Justice of the Bourgeois (Radical) Cabinet, on the suspicion that he was not properly pursuing the guilty in the scandal of the Southern Railways<sup>1</sup>—the legal forms necessary for the withdrawal of the case from him were not observed. The Senate took the offensive. It voted a resolution of censure against the government by 156 and 63. Bourgeois answered that this was aimed at the government's general policy (in particular the progressive income tax). The Chamber supported him by 314 to 45. The Senate repeated its censure; and raised the question of its constitutional rights. The Chamber gave the government its confidence by a large majority, though some who had previously abstained from voting were now found ranged against Bourgeois. The Senate replied by a vote of 175 to 59 in favour of the declaration that

'the Ministry argues that it may govern without the Senate. . . . It assumes that ministerial responsibility cannot be involved before the Senate. We protest against this attack upon the clear dispositions of the laws of the constitution. . . . We affirm our right of control and the responsibility of ministries before the two Chambers'.

But the Senate, nevertheless, did not sever diplomatic relations, as it were, with the Ministry.<sup>1</sup> This showed that the Senate did not really believe in its claims ; for if it had it would not have scrupled to force an open rupture, and to trust to law and opinion to support it. The struggle raised divided the country into those who were for conservatism in government and those who supported a policy of social reform. The cry was on the one side '*Vive le Sénat !*' (at the fashionable Auteuil race-course) and '*A bas le Sénat !*' in the South-West of the country. Then the Cabinet asked the Chamber to vote credits to send troops to Madagascar, they were accorded, and the Chamber was adjourned for the Easter recess. The Senate, now by itself, voted no confidence in the government, and adjourned without voting the credit. When the Senate returned, the leaders of the three majority groups declared :

'Three times has the Senate refused its confidence to the Ministry, and that by considerable majorities. However, in violation of the law of the Constitution, this ministry has kept itself in office . . . we will not refuse the credits, but we cannot grant them to the present ministry.'

And the Senate adjourned its vote until it should have before it a constitutional Ministry possessing the confidence of both Chambers.

Upon this Bourgeois gave up the struggle, knowing that he had no large compact majority : in fact, his declaration on the whole subject was received in a fashion which illustrates the nature of French parliamentary life as few single episodes do. The general principle of 'the preponderance of universal suffrage' was voted by 282 against 28 ; the resolution to prosecute democratic reforms by 379 against 31, but the resolutions together, which meant support of the existing government, suffered 324 abstentions from voting. The Government's majority was 256 to 20. The Cabinet fell through the abstentions, to its own satisfaction as well as that of the deputies hungry for ministerial opportunities. Nothing of principle was settled : only this was proved, that a division of interests in the Chamber of Deputies automatically redounds to the advantage of the power of the Senate. The principle of universal suffrage was sold by deputies, for the chance of ministerial office.

The after-history of this episode also illuminates the shifting shadows of French politics. A moderate government followed, under Méline. This Cabinet skimmed over the constitutional issue ; its declaration<sup>2</sup> to the Chamber of Deputies on appearing before it recognized that it was '*impossible to legislate and govern without the co-operation of the Senate*'. This government began with a weak majority (about 279 to 257), but this, says Seignobos, grew, 'by the

<sup>1</sup> Cf. *Déclarations Ministérielles*, p. 82. The Cabinet then included senators.

<sup>2</sup> *Déclarations Ministérielles*, 30 April 1896.

floating votes of "ministerial" deputies', that is to say, those who ranged themselves with the government, not because they genuinely believed in its principles, but for the prestige and favours which come to sycophants, and which in France are particularly important to satisfy constituents.

Later governments have recognized the power of the Senate, but it must be admitted that the scope of its authority is a different question, vaguer and much less settled. Thus, in 1899, the Prime Minister, Waldeck-Rousseau, faced with the need for legislation to conduct the Dreyfus affair specially asked the Senate for its support of the law, saying that he could not proceed with his government unless it were voted by the Senate or by the Chamber.<sup>1</sup> In 1905 a similar situation arose in regard to the separation of Church and State; in 1908 Clemenceau appealed in the same way to the Senate regarding the purchase of the Western Railway. These cases show two things: firstly, that the Ministries had to take the Senate's power strongly into their calculations; but also, that, by using tactics well known to all politicians, of daring others to use their power by the threat of resignation, the Ministries were able to make the Senate lose confidence in itself and to vote confidence in the government. In 1913 an even more important incident occurred. A long controversy had ensued on the subject of electoral reform: proportional representation and *scrutin de liste* (that is, large multi-membered constituencies) had received diverse and fluctuating majority and minority support. A tremendous majority (403 against 110), though composed of the diverse groups whose leaders had little control over their followers, and whose principles were vague and hardly shared by all the avowed members, seemed to be largely in favour of Proportional Representation. At least 310 members formed an *ad hoc* group. But they were members of Extreme Right and Left groups; and it was known that the Senate would never agree to a project put forward without the assent of the Centre groups, their political friends. Some Left groups, therefore, tried to arrive at an agreement with the Centre groups. This itself is a good illustration of the pervasive if not the open effect of the power of a second chamber. An agreement was reached by mutual concessions; but the groups and members who had made this agreement broke away on different occasions and for different, self-regarding reasons. After thirteen months of 'confused discussion, irrational compromises, and contradictory decisions, the Chamber arrived at a long, complicated and obscure text . . .',<sup>2</sup> the majority being 339 against 217. The Senate appointed a commission whose members were elected so that any other result than rejection was impossible. Then the Senate supported the majority system of election by 161-128 votes: that is,

<sup>1</sup> Lavissee, op. cit., VIII.

<sup>2</sup> Ibid., p. 281.

it rejected the law. The Prime Minister, Briand, had pleaded before the Senate, saying, '*I plainly put the question of confidence*'. The government therefore resigned. On the 30th June, 1923, M. Poincaré, as Prime Minister, put the question of confidence in the Senate, and again several times in 1924. In April, 1925, Herriot resigned after a vote of no confidence in the Senate. Similarly M. Tardieu in December, 1930.

What is the meaning of this history? As for authority, the plain text of the constitution seems to be clear.<sup>1</sup> Now authority is power which is recognized, and we have seen that the Senate is certainly in possession of power, and that in important cases its power has been recognized by the downfall of those who have opposed it. What, then, is recognition? As regards the authority of the Senate, it consists, in the first place, of a genuine belief of the groups, from the Right Centre to the Extreme Right, in the political necessity for a Second Chamber; right or wrong as it may be judged in any particular use of its power, these groups will always tend to be in favour of the Senate, because though it is an institution which may from time to time err in judgement, it can never lack ultimate justification. Secondly, recognition issues from the opportunism of large numbers of deputies who support or desert a government which is in conflict with the Senate because they rate the importance of the immediate gain above the importance of the ultimate position of the Senate, and too often consider only the gain for their own careers. Recognition comes from popular unwillingness to support those governments and those deputies who will stand out against Senatorial power: and much of this is derived from the belief that, given the nature of its members, a check upon the chamber is necessary. These are the ultimate sources of authority: and the Senate enjoys their fruits. But they are clearly uncertain factors: no one can predict their quantity and their quality and, therefore, the meaning of the constitutional clause is not precise, though it seems clear. The Senate, we can safely

<sup>1</sup> Cf. Duguit, *op. cit.*, IV; Esmein, *op. cit.*, II; Barthélemy, *Principes de Droit Constitutionnel*; Hauriou, *Précis de Droit Constitutionnel*; Nézard, *Précis du Droit Public*.

However constitutional theorists are divided, Duguit (and others for whom see Redslob, *Le Régime Parlementaire*, p. 245 ff.) argue that the powers of each House are absolutely equal, and a government must retire if it is outvoted in the Chamber. This is rested upon the argument of the intention of the constituent assembly: and upon the theory that dissolution would settle which of the Houses was to prevail. Esmein is the leader of the opposed theory. He denies the Senate the power of overturning a government. He bases his view upon English practice, early French experience with the Chamber of Peers, and the theories of Broglie and Prévost Paradol whose constitutional doctrines had such a wide circulation when the Constitution was being formed. Dupriez (*Les Ministres*), as well as Esmein, points out the practical difficulties of the necessity for such a majority in two Chambers. It is even greater than they imagine since they do not allow sufficient weight to the non-existence of party organization. This view is also taken by Nézard, *Précis du Droit Public* (1931), p. 210.

say, is to be reckoned with, but exactly how far is a variable quantity.

Hence, the Senate is able to exercise, as the Chamber does, a daily supervision over the government, by means of interpellations and through its commissions. (But *oral* questions cannot be put unless the Minister previously accepts them.) We will not at this stage enter into an explanation of the technical processes of these institutions, for we deal with them fully in regard to the Chamber of Deputies. Generally speaking, the ministers are called upon to answer for their day-by-day conduct of the administration, and through this medium the will and the ability of the Senate are brought to bear upon the actual work of government. Now, as we have said and demonstrated by statistical analysis, the Senate contains a large number of men with long and varied experience of high office. The Commissions are usually headed by men of this kind, some of whom have been Prime Ministers.<sup>1</sup> The Minister in charge of a bill, or asked to explain some administrative history, or to defend a vote of money, is not always a man of longer experience, either in parliament or in a ministry, than his inquisitors. Hence, concessions are easily obtained; and even major concessions are granted to avoid a larger and open conflict. Some Senatorial Commissions<sup>2</sup> have been of greater effect than their colleagues in the Chamber of Deputies, and to-day they have better organization and secretarial and advisory personnel than the Chamber of Deputies; they are permanently and spaciouly housed. During the War, especially, the Commission of the Army, Foreign Affairs and Finance of the Senate acquired a mastery over the conduct of the War, transcending that of the government itself.<sup>3</sup> The reasons for the pre-eminence of the Senate Commission of the Army are given by Mermeix, in an interesting work.<sup>4</sup>

‘There was this difference between the work of the two Assemblies, that in the Senate members were more severe; vehement, if not more vigilant than

<sup>1</sup> E.g. in 1924 five Presidents of Senate Commissions had previously held ministerial office:

<i>Name of President</i>	<i>Commission</i>	<i>Ministry</i>
Méline	Agriculture	Agriculture
Milliès Lacroix	Finance	Colonies
Morel	Customs	Colonies
Lebrun	Army	Colonies (3 times)
		Liberated Regions
Lhopiteau	Railways	War
		Justice

Of the Vice-Presidents, Paul Doumer (Finance) had been Minister of Finance; Fernand David (Agriculture) had served as Minister of Commerce, of Public Works and finally of Agriculture.

<sup>2</sup> See Pierre, *op. cit.*, for the composition and power of Commissions in the Senate.

<sup>3</sup> From 1914–16. The powers of the Commissions, excepting that of the Army, were prorogued after 1916.

<sup>4</sup> Cf. Mermeix, *Au sein des Commissions, Fragments d'Histoire*, 1914–19, 2nd ed., Paris, 1924, p. 210 ff.

in the Chamber, and that public opinion interested itself much more in the work of the Commission of the Senate than in the Commission of the Deputies.'

This was due to the illustriousness or originality of some of its members. Its president for some time was Freycinet, Secretary-General of the Ministry of War, under Gambetta, in the final stages of the war of 1870-71. He was followed by Clemenceau. Among the vice-presidents was Paul Doumer, a man of immense experience and civil organizer of the defence of Paris in September, 1914, and since 1931, President of the Republic. There were others who had had distinguished careers. More: no one in the Senate Commission could be charged, as some of the Deputies could be charged, with pre-war pacifism and policies of unpreparedness.<sup>1</sup> Since 1908, the Senate Commission of the Army had taken the lead in harassing Ministers for more guns and munitions. To-day the Senators attend their commissions and work harder than the average Deputy, and with a deliberation not entirely perhaps appropriate to the urgency of the subject-matter.

**Conclusion.** Thus the Senate of France has largely fulfilled the intentions and justified the hopes of its creators: it has been a check upon the pure law of Number. It seems clear to us that the cause lies in two things: the bad conduct of the Deputies which loses them the confidence of the country, and, partly arising out of this, the lack of party organization strong in each Chamber and the country, uniting the two Chambers by a policy and a programme made by the common advice and consent of the Deputies and Senators in party caucus assembled, prior to their separation into the two legislative bodies.

Whatever the cause, the Senate plainly possesses power, and its effect is to curb and check the Chamber of Deputies. This has its repercussions upon the question of the nature of representative government. Deputies are slack in their promises, knowing full well that any impossible or undesirable thing that they may promise as a *quid pro quo* for election will be squashed by the Senate. This is a premium upon demagoguery. Further, the actual distribution of power in general between the two Houses, and in particular cases, cannot but be obscure to the man in the street. Have we not already seen how obscure the matter is to the greatest constitutional authorities? Upon whom, then, can we fix responsibility for any particular act? The vicious circle is not broken: elected on promises which he knows cannot be carried out, the Deputy returns to the electorate, pleading that the Senate is blameable for the nullification of his pledges. To the extent to which the Senate makes good its power the proceedings of the Chamber lose in importance. Perhaps that fact has tended to depress the value of party and, therefore, to stop its growth; and

<sup>1</sup> This is an interesting, if unintended, comment on the character of the Senate.

it may be that only in those countries where the Second Chamber is exceedingly weak and the First Chamber overwhelmingly strong can representative government attain its fullest meaning as desired by its most hopeful theorists.

Let us observe, finally, that the Senate has been content to remain a centre of revision and resistance, and has rarely and only in relatively unimportant matters attempted to take a lead in initiating laws. Its numbness to popular drive is shown by its tardiness in accepting the political groups as the nominators of its Commissions. While this was accomplished in the Chamber in 1910, it was established in the Senate in 1921. It has left the initiative to the Chamber of Deputies and the government and, in fact, no great piece of legislation has ever been prompted by it. So that energy seems to reside principally in the Chamber of Deputies. The Senate often converts this energy into waste. The noise engendered by universal suffrage and frequent elections and the appearance of multifarious and busy activity is reserved for the lower House : the Senate watches and plans, weeds, discriminates, and quashes. It is all the more effective for not attracting the public attention. Every minister has a few good friends in the Senate among his entourage, and their influence is always operative. Only the Socialists have a really earnest attention to reduce its powers.<sup>1</sup>

#### THE U.S.A.

It is hardly proper to treat the Senate of the U.S.A. as a Second Chamber, for, as we have seen, Second Chambers were meant to check and not to innovate, and this, indeed, is the function to which the practice of government has limited them. The Senate of the U.S.A., designed to check upon the House of Representatives, has entirely left the constitutional rails and has ploughed its own way into a distinct primacy in the Congressional system, while the House of Representatives has declined into a state of garrulous and gesticulating debility. How is the primacy of the Senate realized, and what are its causes ?

The strength of the U.S. Senate is derived from four main sources : its powers as by law conferred and in practice employed and developed ; its composition, as determined by law and political practices ; its rules and habits of work ; and, finally, its relation to political parties.

**The Senate's Powers.** The Constitution, carrying out the compromise made by the founders, and especially in this instance seeking to avoid the perils of unrestrained democracy, endows the

<sup>1</sup> Electoral Manifesto, Senatorial Elections, 9 January 1927 : ' to revise . . . as in the English monarchy . . . the powers of  *veto*  and suspension '. Cf. resolution moved at the National Assembly of August, 1926, to amend the Constitution in this sense (Negard,  *op. cit.* , pp. 206, 207).

Senate with important legislative and *executive* powers. It is not too much to say that the force and reason for self-esteem implied in the scope of real executive powers have lifted the Senate above the level of any Second Chamber in the world, and have contributed more than anything else to its triumph in the legislative sphere. For it is not only a legislative body, but it is an inseparable, an organic part of the *government*. Lift the Senate, with its functions, out of the Congressional system, and you have not only given a free legislative activity to the House of Representatives, but you have destroyed important organic parts of the Presidency and the administration. Such a hole is left that the surrounding earth cannot stand. Take the French Senate out of the French Constitution, and it is only a trifle unbalanced ; remove the British House of Lords and the Constitution would stand on a more even keel. To touch these assemblies is in each case to do no more than remove an arm or a leg ; to remove the American Senate is entirely to eviscerate the Federal government. It is in the executive powers of the Senate that the secret of its strength will be found.

The Constitution gives the Senate these powers : all legislative powers granted by the Constitution are vested in both Houses<sup>1</sup> ; bills to raise revenue must originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills<sup>2</sup> ; the President has power to make treaties, provided two-thirds of the Senators present concur<sup>3</sup> ; its advice and consent are necessary for nominations made by the President of 'ambassadors, and the public ministers and consuls, judges of the Supreme Court, and all other officers of the United States . . .'<sup>4</sup>

The last two powers are executive. Let us first see what they have come to mean. Not only does the President need the concurrence of the Senate to the making of treaties, but a two-thirds majority is necessary. Thus an opposition of one-third is able to impede the treaty-making power ; this means that every unit composing either the majority or the minority of the Senate is of special importance compared with that where the majority principle pure and simple operates. A special power is thrown into the hands of individual Senators ; it ministers to their self-esteem, breaks up the Senate as a body into a number of self-important and uncompromising units and groups. As against the Executive in the matter of treaties, the Senate has not only the authority, but the special constitution necessary for great strength. When the Fathers founded this body only thirteen states were in contemplation. A small select body of twenty-

<sup>1</sup> Art. I, Sect. 1.

<sup>2</sup> Art. I, Sect. 7.

<sup>3</sup> Art. II, Sect. 2.

<sup>4</sup> The continuation of this is, however, important : 'whose appointments are not herein otherwise provided for, and which shall be established by law : but Congress may by law vest the appointment of such inferior officers, as they think, in the President alone, in the courts of law or in the heads of the departments.'



six elder statesmen was before their eyes<sup>1</sup>; whatever Madison may have had to say about building for future ages, twenty-six of our own kind now make a vastly different picture from an unguessed number of phantom Senators in the inconceivable environment of a century hence.<sup>2</sup> The Fathers thought that Senatorial co-operation would rule out the autocracy of foreign affairs as practised in England; the States would have at least some power in foreign affairs in exchange for their sovereignty; nor could one depart so far from practice under the Confederation which had provided for entry into treaties and alliances by nine of the thirteen states voting as units. The House was excluded, because it was too large for secrecy.

**The Treaty Power.** The power has raised two main classes of controversy: what is a treaty, and are the Senators merely to say Yes or No, or are they to compose a treaty of their own as a permissible substitute for that presented by the Executive? Much discussion has centred upon the first controversy, the Senate always seeking to bring as much of the power of foreign negotiations under its control as possible, by a natural desire for power, and that desire has been considerably satisfied.<sup>3</sup> It is true that the initiative lies with the President,<sup>4</sup> but his mind always gropes for contacts in Congress, and particularly in the Senate, for he never knows when he may be compelled, as the finishing touch, to any negotiations, to turn to the Senate for approval. It passes resolutions embodying policy, and though these have no executive force they may acquire it through the ultimate need of the Executive to bend to the Senate.<sup>5</sup>

As to the second controversy about its power, the Senate long ago made up its mind that, once approached by the Executive, it had a full right to participate in and, when necessary, to dictate, the composition of a treaty. A right to refuse concurrence given in the unqualified manner of the U.S. Constitution cannot, in the known state of human nature, be anything other than a right to establish independent principles of foreign policy and treaties based upon them.<sup>6</sup> The practice of the Constitution, beginning with Washington's dissatisfaction with the Senate which he had consulted over a *project*

<sup>1</sup> Jay, *Federalist*, LXIV: 'Then we see, that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity and deliberate investigation on the one hand; and from secrecy and dispatch on the other.'

<sup>2</sup> Cf. Hamilton, *Federalist*, LXIII: 'Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small, that a sensible degree of the praise and blame of public measures, may be the portion of each individual. . . .'

<sup>3</sup> See Corwin, *The President's Control of Foreign Relations*, 1917.

<sup>4</sup> More precisely defined in the Chapter on Chiefs of State.

<sup>5</sup> Corwin, *op. cit.*; Mathews, *American Foreign Relations* (1928), Chap. X.

<sup>6</sup> See Lodge, *The Treaty-making Power of the Senate in A Fighting Frigate and other Essays and Addresses*, pp. 231, 232.

of a treaty,<sup>1</sup> is that the Executive does not *formally* approach the Senate until after negotiation and agreement with the foreign party. But Presidents are not always strong enough in character or following to carry through their treaties without previous informal consultation with leaders of the Senate, and, in any case, the power being vested in the Senate, what sound argument can be raised against previous consultation with the wiser and more powerful Senators? The modern Press has abolished the old power of the Executive to be the *sole* channel of international communication, and certainly Senators cannot be stopped from expressing their opinion by the President's refusal to submit the draft of a treaty with relevant information. The process of Senatorial amendment of the treaty begins as soon as the newspapers contain a report of its supposed contents. It is in the interests of successful Presidential action, then, that he early begins to pay attention to the Senate. Presidents who do not are liable to suffer the fate of President Wilson and the Treaty of Versailles. Appreciation of the Senatorial power has even caused Presidents to seek the co-operation of Senators by their appointment as delegates to treaty conferences.<sup>2</sup>

Yet all these tactics have not taken its sting from the Senatorial power, and the Senate has been really powerful over foreign affairs through the severity of its amendments of draft treaties. The power is evident, and men like Senator Lodge<sup>3</sup> or Senator Borah, who became Chairmen of the Senate Foreign Affairs Committee, possess great power; and its strength has caused serious heart-searchings among those who are interested in the conduct of international affairs. For it must be admitted that it is not always the substantial elements of the treaty which determine the attitude of Senators, but their domestic party concerns, their parochialism, which issues from the peculiar relationship between representative and constituents, their ignorance, due to the nature of the American party system which admits candidates of a low level of culture, and the remoteness of the country from contacts with the outside world so evident, like those of Europe, as to instruct even the tyro in foreign affairs. This power raises the Senate above the House in popular and even Congressional opinion; and this prestige gives birth to further political power—in the party councils, in the State machines; and this again disposes the Executive to open jobs for the Senators, while

<sup>1</sup> See Lindsay Rogers, *The American Senate*, New York, 1926, p. 62. Cf. Mathews, *op. cit.*, p. 404.

<sup>2</sup> As, for example, after the war of 1812 by President Madison; at the end of the Spanish-American War by McKinley; and at the Washington Conference on Reduction of Armaments, 1921. But this practice has been contested on the ground that such appointments infringe the rule that Congressmen cannot be appointed to office under the United States Government, and the argument has been conceded.

<sup>3</sup> Cf. Groves, *Henry Cabot Lodge, the Statesman*, 1925, and *Selections from the Correspondence of Henry Cabot Lodge and Theodore Roosevelt*, 2 vols.

the Constitution sanctions this disposition and even makes it the sacred duty of a Senator to distribute appointments. This, again, is fuel to the engines of Senatorial power.

**Appointments.** The Constitution gives the Senate power to co-operate with the President in certain appointments. The number of these appointments was small in 1800 : by 1900 tendencies with which we are already familiar had swollen the number to thousands. The Fathers certainly did not know exactly where they were going. The astute James Wilson said : ' According to the plan as it now stands, the President will not be the man of the people as he ought to be, but the minion of the Senate. He cannot even appoint a tide-waiter without the Senate.' <sup>1</sup> Hamilton, on the other hand, made out that the *choice* would remain with the President : ' They may defeat the choice of the Executive, and oblige him to make another ; but they cannot themselves *choose*—they can only ratify or reject the choice of the President.' <sup>2</sup> This is an extraordinary lapse of judgement on Hamilton's part, as also was his remark in the same place, that the attitude of the Senate would depend upon ' the appearances of merit, and the proofs of the want of it '.

The Senate soon converted its constitutional authority into the convention known as ' Senatorial courtesy '. ' Senatorial courtesy ' is the legitimate expectation of every Senator that the President will choose as incumbents of certain civil service positions only those persons who politically or socially satisfy the Senators from the State in which the offices are located, or whence the candidates come ; of course, only Senators of the President's party expect or can obtain accommodation. <sup>3</sup> What sanction have Senators for this ' courtesy '—for even courtesy has its driving force ? It is understood, and rarely does the contrary occur, that the expectant Senator votes against the appointment unless it satisfies the rule : and all the other Senators support him. He does the same for any other disappointed Senator. Why do Presidents, even the strongest and sternest, like Roosevelt and Wilson, bow to the practice ? The answer is twofold : they need party support in Congress (in the House as well as the Senate), and must buy it in some way. Further, the number of offices to be filled is so large that even Taft admitted that he had to rely upon the advice of the Senator who knew the man, <sup>4</sup> and Roosevelt's resolution that only his standards would prevail quickly proved vain. <sup>5</sup> By such favours the President overcomes opposition in Congress and

<sup>1</sup> Farrand, *Records*, II, 523.

<sup>2</sup> *Federalist*, LXVI.

<sup>3</sup> Cf. Kimball, *National Government of the United States* (1920), p. 185 ff. ; Beard, *American Government and Politics*, p. 197 ; Gosnell, *op. cit.* ; H. W. Horwill, *The Usages of the American Constitution*, New York, 1925, p. 126 ff.

<sup>4</sup> *Four Aspects of Civic Duty*.

<sup>5</sup> Cf. Bishop, *Theodore Roosevelt and His Times* (1920), I, 157, 215, 248, 422 ; II, 14.

prepares the way for the next presidential nominations, either for himself or for a worthy recognized successor. In order, therefore, to prevent the Presidency from degenerating into an autocracy, the Senate obtained a power which has developed into a simple engine of Senatorial rapacity, very expensive to the nation. For though the appointees do apply themselves to their work, few pretend that the money could not be better spent upon technically qualified officials appointed by civil service procedure.

The major appointments, like ambassadorships and Supreme Court judgeships, are not settled on the principles set out above. Party does play a part, of course, and among ambassadors there have been men whose only qualification for office was wealth and steady adherence to a party, or, merely, a President. But it is generally recognized that these offices are in the gift of the President and his two or three chief confidants. They are not the subject of Senatorial barter. As for the President's Cabinet officers, they are normally immune from intervention by the Senate. But in March, 1925, President Coolidge was humiliated by the repeated rejections of his candidate for the Attorney-Generalship. The Senate did this with deliberation, since Mr. Warren's past was alleged to have been 'not such as to warrant a belief in his zeal to prosecute Trusts.

Is the President's removal power dependent on the concurrence of the Senate? The power to remove is an indispensable instrument of administrative direction and discipline. It is also a political power. The President has good claims to the first: the Senate has good claims to the second. Hence a struggle as old as the constitution itself. In 1867 the Senate passed the Tenure of Office Act, providing that no officers should be dismissed until their successors had been appointed by and with consent of the Senate, unless for suspensions in recess only or crime. The Senate was Republican, President Johnson, Democratic; and the Republicans feared the wholesale removal of their partisans. Until that time removal was entirely a matter of presidential discretion. But besides the Tenure of Office Act of 1867, which was repealed in 1887, many other acts have limited the power of removal. A general challenge to the validity of these acts was made in the case of *Myers v. United States*.<sup>1</sup> This was fought by a postmaster who was removed by the President without the 'advice and consent of the Senate' as required by a statute of 1876, and judgement rendered in 1926 favoured the unrestricted right of removal by the President.

The serious problem raised by 'senatorial courtesy' is that neither Senate nor President is much affected by considerations of public advantage, except as the accidental offspring of splenetic partisanship. Neither, then, can be trusted separately to give up public power for the sake of the public good. Nor is the situation much bettered

<sup>1</sup> 272, U.S. 52 (1926).

now, when power is shared. For bad appointments are made out of mutual accommodation. The want of sterner morals in politics, and the lack of genuine party differences in the country, reduce us to the belief that whether the President has alone the power of removal or whether it is shared, little good will come of it either way—perversion is inevitable.

**Law-making.** The power now exerted by the Senate is very great, and it is increased by the ability of the Senator in all ordinary cases to govern the conduct of the Representatives from his State by the distribution, for their campaign purposes, of the minor offices which fall to his profit.<sup>1</sup>

The Senate, with so much strength acquired by its executive functions, has been able to make important use of its legislative powers, though its mode of composition and its habits of business have quite as much to do with its political success. But let us now concentrate upon its position as a legislative body. Its power is laid down in the constitution, and this has amply supported the natural propensity of a body to use as much authority as it can obtain commensurate with the energy needed for its acquisition. The Senate has not allowed its power to initiate laws to fall into desuetude and, in fact, many very important laws have been introduced in the Senate.<sup>2</sup>

Secondly, it is a serious check upon the activities of the Lower House. No bill which comes up escapes a severe overhauling, and many, of course, never return from the limbo of committees. When the House and the Senate disagree, a compromise is achieved by means of a mixed Committee, but that compromise, for reasons we shall give presently, is usually dictated by the Senate.<sup>3</sup> In financial matters the Senate appears to have been put into a distinctly inferior position: yet its actual exercise of the power to amend and reject has caused its conversion into the power to originate. For example, in 1883, all the clauses after the enacting clause of the Tariff Bill were struck out and a new bill put in; in 1901 a bill repealing many taxes was amended by the cancellation of everything after the enacting clause and the substitution of a new measure reducing the taxes on beer and tobacco<sup>4</sup>; in 1909 the Payne-Aldrich Tariff Bill was transformed by the addition of 847 amendments<sup>5</sup>; the War Revenue Bill of 1918 called forth 265 successful amendments; the Tax Laws of 1921 were introduced by the House, but the Senate substituted its bill in 833 amendments, and won completely on 700 of them and

<sup>1</sup> When the State has no Senators of the President's party, patronage is distributed by the Representatives; and normally Senators and Representatives of the same party and State confer on the matter.

<sup>2</sup> Cf. Lindsay Rogers, *op. cit.*, App. C, for the number of Bills introduced in the Senate in the 64th–68th Congress.

<sup>3</sup> Cf. *Congressional Conference Committees*, by A. C. McCown (New York, 1927).

<sup>4</sup> Reinsch, *op. cit.*, p. 112.

<sup>5</sup> Cf. Stephenson, *Aldrich*, p. 347 ff.

compromised on most of the others. The Emergency Tariff Act of 1921 similarly suffered drastic transformation ; while the Tariff Law of 1922 succeeded in evoking 2,428 amendments against which the House made almost negligible gains.

Why has the Senate been able to acquire this strength ? American critics are agreed upon its sources.<sup>1</sup> They are the longer term of the Senate ; the continuous nature of its existence which is produced by its partial renewal every two years ; the progress of Congressmen from the Representatives to the Senate ; the greater experience and *savoir-faire* of the Senators ; their connexion with the political machine ; the small size of their assembly ; the absence of closure. The long term of the Senators, six years, when compared with that of the House, two years, produces a spirit of independence, of more consequential planning, and self-respect ; while the House is timid by virtue of the immediacy of its electoral preoccupations. No sooner does the Lower House get into the middle of its work than it must prepare for re-election. If a tithe of its promises are to be fulfilled—and what member would not consider it to be a miracle if that proportion were achieved ?—the Representatives are obliged anxiously to wait upon the Senate. The Senate, each Senator, since there is no closure except by ‘ unanimous consent ’, is conscious that he can send the Representatives to legislative perdition. There is both strength and the consciousness of strength. The shortness of the electoral period of the Representatives is further aggravated by the manner in which the Sessions are constitutionally arranged.<sup>2</sup> The effect is that Representatives chosen, say, in November, 1926 (and the elections for the House are in each even year at biennial intervals), are not normally called into session until December, 1927. Thus within eleven months from that time they have to seek re-election. In that last eleven months the pressure of legislation is, then, intense ; and the intenser it is the greater the power of the Senate to wring concessions from the Lower House. In the financial bills ‘ tacking ’ and ‘ riders ’, which are full legislative powers, are practised, and the Representatives are obliged to take what they are offered in order that they may at least get the semblance of what they want.

Many members of the House of Representatives ultimately find a way into the Senate ; for example, in the 68th Congress (1924) twenty-four Senators had served terms as members of the House of Representatives, that is, one in four of the entire membership, and

<sup>1</sup> Cf. Rogers, *The Senate*, Chap. VIII ; Beard, *op. cit.* ; Kimball, *op. cit.*, Chaps. XII, XIII ; Wilson, *Congressional Government*, Chap. IV, and *Constitutional Government* ; L. Haines, *Our Congress* ; J. T. Young, *New American Government and Its Work* ; Reinsch, *op. cit.*, p. 82 : ‘ Its actual power which it now wields *qua* Senate, rather than *qua* representative of the sovereign states, is founded primarily upon the fact that it possesses great permanence, experience, training, and close connexion with powerful interests and organizations.’

<sup>2</sup> Constitution, Art. I, Sect. 4.

their term of government in the Lower House adds to their confidence in dealing with it, besides having been an excellent school of political strategy. Further, the age qualification for Senators is a little higher than that for members of the House of Representatives. In the one it is 30, in the other 25. But, in fact, the disparity is greater than that between the difference between the minima. Membership of the Senate is so much coveted that it cannot be reached except by a candidate who has made an important political following for himself by exceptional talents,<sup>1</sup> or by the laborious creation of a clique,<sup>2</sup> or by money and 'bossism',<sup>3</sup> or an outstanding industrial or commercial career. These things cannot be acquired without years of work. Thus the Senate has a high age composition.

TABLE V<sup>4</sup> (Age groups in the Senate, 1931)

Average age of Senators, 59.5 years										No.
Age										
35-40	.	.	.	.	.	.	.	.	.	2
40-45	.	.	.	.	.	.	.	.	.	3
45-50	.	.	.	.	.	.	.	.	.	5
50-55	.	.	.	.	.	.	.	.	.	19
55-60	.	.	.	.	.	.	.	.	.	18
60-65	.	.	.	.	.	.	.	.	.	12
65-70	.	.	.	.	.	.	.	.	.	11
70-75	.	.	.	.	.	.	.	.	.	9
75-80	.	.	.	.	.	.	.	.	.	2

The competition is also keen : for there are only ninety-six positions in all, and only marked talent—some of it naturally low cunning—

<sup>1</sup> Senator Lodge.

<sup>2</sup> E.g. Platt, La Follette, Borah.

<sup>3</sup> As Aldrich ; and the Vare interests in Pennsylvania.

<sup>4</sup> In only eighty-one cases out of ninety-six did the *Congressional Directory* give the data for a calculation of age. Therefore Table and Average are based on a sample of eighty-one. It is convenient at this point to compare the age composition of the British House of Commons and the U.S.A. House of Representatives :

*House of Commons* (elected 1929), only 591 members disclose age. Average = 51 years. Total is 615.

*House of Representatives* has a full complement of 435 ; but only in 279 is age given in the *Directory*. Average = 53.4 years.

Age	No.		No.	
	H. of C.		H. Rep.	
25-30	14		1	
30-35	23		6	
35-40	42		7	
40-45	69		18	
45-50	89		46	
50-55	121		65	
55-60	97		58	
60-65	70		45	
65-70	50		21	
70-75	11		8	
75-80	6		2	
80-85	—		1	
85-90	—		1	

wins.<sup>1</sup> These same men are usually the controllers of the state political machines, and play a large part in the nominating conventions. Representatives are beholden to them, and so are Presidents.<sup>2</sup>

Then, too, it is the Senate's custom to elect to important positions upon the Committee—whose work is fundamental to the legislative output and administrative control—mainly, almost only, by seniority.<sup>3</sup> This means that those with the longest experience of office and negotiation decide what shall be done with the bills from the Representatives and meet their conferees, and superintend activities and criticize the policies of the President and his Cabinet. Names like Lodge, Root, Borah, Quay, Smoot, Aldrich, Platt, Beveridge, La Follette, conjure up substantial visions of effective and extensive power.

Finally, the Senate has no closure, while the House of Representatives is paralysed by it. This means that speech in the Senate is life or death to a project; hence, the country feels it is worth attention. The minority is not 'gagged', and therefore here, the only place in the congressional system, occurs the possibility of a continuous, energetic and public opposition. The Senate can dispense with closure because it is a relatively small body, and because, after all, it is not required, as other parliaments are, to answer constituents for the work actually put into statutory form, nor are its legislative potentialities in any case so great as elsewhere, owing to constitutional prohibitions. It is enough in an American election to prove that the candidate 'testified' or 'went on record'; it is not necessary to say whether a bill was passed, rejected or amended. The word is superior to the deed; and constitutional or party impotence is considered a sufficient excuse for a bad harvest, though a good one was promised.

The complete freedom of debate is both good and bad. It is good that in a system where party is so barren, where responsibility is so dispersed, where opinion requires so long to overtake all branches of the government—six years at least—there should be a forum where even one man can speak without being stopped. That is what the Senate permits. It must, however, compromise with the need of producing statutory results, and this it does by the practice known as 'unanimous consent'. The party leaders arrange that certain days in regular periodicity shall be devoted to certain business—as,

<sup>1</sup> The correspondence between Lodge and Roosevelt reveals the high value placed upon a seat in the Senate.

<sup>2</sup> E.g. Roosevelt and Boss Platt and Aldrich; Wilson and Underwood. See also Kent, *op. cit.*

<sup>3</sup> E.g. Rogers, *op. cit.*, pp. 108, 109; Luce, *Congress: a Study*; cf. also Pepper, *In the Senate*, p. 24: 'Here, as always, it would be better to substitute an ideal system which would always result in the choice of the best man. The practical question, however, is whether the frictionless operation of seniority is not on the whole to be preferred to a free-for-all contest in which success might readily perch on the banner of the lovable incompetent or of a liberal maker of political promises.'



for example, departmental legislation and private bills, on Mondays—or particular dates and times are fixed for a vote. ‘Unanimous consent’ outside the calendar of periodicity, is a matter of amicable agreement, or compromise, between opponents. And only when the Senate is *in extremis*, owing to obstruction and the urgent necessity of results, does it come about. Yet it is said that an adequate amount of work is done.

With due deference to a recent critic who has undertaken to defend the Senate and its freedom from closure,<sup>1</sup> and has done so very plausibly, it must be said that the disadvantages of free debate are serious and, in fact, many authorities urge the need of limitation. The absence of restriction makes it possible for a small and determined minority to hold up the passage of bills for the sake of their own political ideals and for the advantage of their private careers. Bills are held up by ‘filibustering’, that is, by a lengthy speech commenced at a point of time (towards the end of the session, for example, when the House is waiting for the Senate’s assent) when decisions are urgently needed, the floor being held, if necessary, by the collaboration of a group of speakers who threaten to consume days of the Senate’s time, and cisterns-full of pure water. There are many epic examples, in some of which, the Senator ransacked his repertory of schoolboy poems and treasures of prose to fill the gaps in his wisdom. As Henry Clay once pointed out,<sup>2</sup> contests under such conditions cease to be contests of intellectuality and become contests of physical force. Sad, indeed, that a beverage of egg-and-milk should triumph over the epoch’s best wisdom. But that is the consequence of the law of number, and the victory of desire over culture. Senator Lodge pointed out that the majority is prevented from ruling, and that it can deny responsibility, by a false claim that it was powerless to overcome the minority.<sup>3</sup> Filibustering is used not merely for purposes upon which a claim of public advantage can be made out, but to secure the voting of appropriations for various public works and buildings, or other purposes, beneficial to a place or places in the Senator’s own State. This satisfies his pride, wins him support ‘back home’, and enables him to rule his colleagues in the House of Representatives, who, also, must bring home the palm.

It seems to me that the specific goodness or badness of the legislation killed or passed by the aid of the ‘filibuster’, is no proper argument for or against the closure. That is an exceedingly short-sighted view.<sup>4</sup> For it may be taking away more good from the Congressional system than it gives. It necessarily allows localities or senators to hold up the nation for money, whether the expense is nationally good

<sup>1</sup> Rogers, *op. cit.*

<sup>2</sup> 16 July 1841 (in the Senate debates).

<sup>3</sup> *Historical and Political Essays*, Boston, 1892, p. 169 ff.

<sup>4</sup> This is the view taken by Lindsay Rogers, *op. cit.*

or not. It necessarily reduces the power of the House of Representatives—takes from its power and pride and sense of responsibility. It reduces the majority principle to nothing. I am no blind admirer of this principle, but in the known conditions of human nature and human destiny, can we be so sure that any one is so wise as to dispense with the general control of the majority in politics? Even if by doing this, in the case of the Senate, we are able to safeguard the fullness of its power of investigation of the Executive—for this is the ground of defence of unrestrained debate. In fact, the choice is not only between no closure at all and overwhelming advantage to government and society, or, alternatively, a cramping closure, that destroys the power to function. There are middle ways; and they have been suggested at times of crisis in the Senate, and by students of Congressional procedure.<sup>1</sup>

The power of the Senate has not always been held to be a power for the general good, nor has it been coveted because it was regarded as an instrument of the public welfare. In the middle of the nineteenth century the Senate began to outpace the House in the march towards political supremacy, and when success was assured, for its membership was brilliant, the Senate began to attract rich men, who saw in it a source of advantages, which they required for their industries, their class, their social status, or the control over the party-machines of the several States, which again could be used for their narrow interests. Inexperienced or weak Presidents like Grant, Hayes, Garfield, allowed the Senate great leeway in its essential functions. Soon the Senate became full of the representatives, or the actual holders of industrial, commercial and financial interests. Looking back upon this period, Reinsch has said, with general approval, that the Senate could be criticized as being too favourable to the unrestrained power of concentrated wealth, of not weighing impartially the advisability of increased governmental control over economic agencies.<sup>2</sup> Wilson was, in 1900, not so sure of his judgement of the Senate made in 1884. In 1900<sup>3</sup> he said:

‘It is to be doubted whether I could say quite so confidently now as I said in 1884 that the Senate of the United States faithfully represents the several elements of the nation’s make-up, and furnishes us with a prudent and normally constituted moderating and revising chamber. Certainly vested interests have now got a much more formidable hold upon the Senate than they seemed to have sixteen years ago. Its political character also has undergone a noticeable change. The tendency seems to be to make of the Senate, instead of a merely smaller and more deliberate House of Representatives, a body of successful party managers.’

<sup>1</sup> Dawes, 21 April 1925, *Congressional Record*, 69th Congress, special session of the Senate, Vol. 67, pp. 1–2. Senator Underwood advocated a somewhat extreme form of closure (5 March 1925—*Congressional Record*, p. 9). Cf. Rogers, op. cit., p. 182.

<sup>2</sup> Op. cit., p. 85.

<sup>3</sup> *Congressional Government*, Preface to 15th Ed.

This was a less tolerant judgement of the Senate than that made sixteen years before, but even that noted the incursion of men of great wealth,<sup>1</sup> and though any sinister significance was palliated by careful phrasing, yet the stated facts leave a suspicion that the Senate could only be a body mainly interested in courses unhelpful to the poorer and weaker citizens of the U.S.A. The Senate was dubbed 'a millionaires' club'.

When Wilson entered into practical politics he learned that which led him to the conclusions stated in *The New Freedom*. But all this is in a process of change, for in the last generation Americans have awakened to a realization that it is possible for government to be abused—that is, for the social resources of the whole nation to be converted, in the name of the nation, to the benefit of a few.

When the Senate became so powerful, it became as we have indicated, the centre of the party machine.<sup>2</sup> Many of the prominent members became members of the Cabinet, and some stood for the Presidency.<sup>3</sup> Through the domination of national party politics, the domination of State politics became easier, and this again accrued to the security and power of the Senate. Madison's caricature of other people's fears about the Senate came dangerously near to fulfilment.<sup>4</sup>

Two currents of opinion began to flow as soon as the Senate exhibited such power,<sup>5</sup> and its vital connexion with State politics became

<sup>1</sup> Cf. *ibid.* (ed. of 1884), p. 225: 'Nowadays many of the Senators are, indeed, very rich men, and there has come to be a great deal of talk about their vast wealth and the supposed aristocratic tendencies which it is imagined to breed. But even the rich Senators cannot be said to be representatives of a class, as if they were all opulent wool-growers or great land-owners. . . .' Cf. Stephenson, *Aldrich, passim*.

<sup>2</sup> Cf. Reinsch, *op. cit.*, p. 120: 'Through the connexion of individual senators with the party machinery in states and nation, and also with powerful economic interests, the political influence of the body itself is greatly enhanced. The advantageous position of the senators with respect to the control of party machinery was recognized as soon as the Senate had made good its powers over the federal patronage. . . .'

<sup>3</sup> Twelve Presidents of the United States have served as Senators in the United States Senate before their election to the Presidential office. (The total number of Presidents (including Hoover) is thirty; but it should be noted that Washington, Adams, Jefferson and Madison are in a different category.) The influence of the senatorial element is therefore more precisely shown by the proportion of twelve: twenty-six.

<sup>4</sup> Cf. *Federalist* (Everyman Ed.), p. 325.

<sup>5</sup> Cf. Lindsay Rogers, *op. cit.*, p. 105: In 1896 a majority of the Committee on Privileges and Elections reported in favour of an amendment for popular election of United States Senators. The report said: 'It is a fact that must be apparent to all that during recent years an impression, deep-seated and threatening, whether well founded or otherwise, has obtained in the American mind and among the masses of the American people to the effect that the Senate of the United States has become a sort of aristocratic body—too far removed from the people, beyond their reach, and with no especial interest in their welfare. The Senate has, in the past few years, been assailed, as we believe causelessly, from time to time by many of the leading and most influential journals of the country of both political parties.'

'The tendency of public opinion is to disparage the Senate and depreciate its

apparent: that the Senate ought to be more amenable to popular control, that there should be an end to the mixture of State and Federal politics. The latter current was strong and of serious moment to the cause of good government. We have already learnt that the States have political interests different from each other, and from the Federation; their legislatures, it was argued, ought to be elected without regard to each other. Hence, a movement began for the popular election of Senators. The existing system was shown to be very defective. The legislatures of the states chose the senators of the State. The two Houses were often in deadlock, sometimes for as long as two or three years, during which, of course, there was no Senatorial representation. Bribery was possible where a very few votes could make all the difference, and in almost every State the Legislatures were for this reason among others, corrupted. It was inevitable that during the State elections members should be chosen not only for their State policy but for their promises of support of such and such a Senatorial nomination.<sup>1</sup> . . . Progressive States began to make primary laws which arranged that Senators should be nominated in the party primaries. This meant that the men so chosen were voted for at the State elections by the people, and those securing the most votes became the 'people's choice' for Senator. Then a candidate for the State legislature would promise to support the people's choice. This was a half-way house: it was not complete popular election, nor complete disjunction of State and Federal issues. The Senate was bombarded by propaganda to allow a constitutional amendment for direct election. It did not capitulate until the procedure indicated had been adopted in thirty States. Then, in 1913, the 17th Amendment was ratified: 'The Senate of the United States shall be composed of two Senators from each State, *elected* by the *people thereof*. . . .'

How has this amendment affected the composition and power of the Senate? Opinion has not yet crystallized owing to the short time since the coming into effect (fully) of the Amendment. But students seem to be agreed upon these conclusions,<sup>2</sup> that expenditure

dignity, its usefulness, its integrity, its power. If there is any cause for this tendency in the public mind, it should be removed without delay. Although the Senate of the United States should be and, in fact, is the most dignified, as well as the most important legislative body in the world, the tendency in public journalism and in the popular mind is in a large degree to detract from its importance, minimize its dignity and power, and cast the spirit of obloquy over and around its members. While your Committee are of the opinion that the impression which leads to all this is, to a very great extent at least, not well founded, yet it is a fact that cannot be ignored that it exists.'—54th Congress, 1st Session, Senate Report No. 530.

<sup>1</sup> Cf. Haynes, *op. cit.*

<sup>2</sup> Cf. Beard, *American Government and Politics* (1929), p. 238: 'It is certain that candidates for the Senate under the new system must perforce make a state-wide campaign, and the type of man who is most efficient in formulating programmes which arouse public interest and in making speeches which arouse popular enthusiasm will

on elections has increased very much, that the demagogue is likely to triumph over the intriguer, that the sinister representatives of high finance, like Aldrich, no longer have the chance of election, that the type and tone of the Senators is distinctly more popular.

Thus the Senate is not on a par with any other Second Chamber in the world. It is an exception among them. Maine said that it is 'at this moment one of the most powerful political bodies in the world' <sup>1</sup> . . . and it is generally held that the Fathers' intentions have been well fulfilled. The Senate has gone beyond the range of power designed for it, and the reason is that it has grasped all those opportunities of action which the Fathers believed that respect for constitutional checks and balances would cause it to ignore. Not so: it took all that it could get: and instead of following the path of self-control it followed the line of least resistance; for few people are gifted with the ability to see what is for the public good by a vision transcending their strictly individual minds, and inevitably this leads in the first place to self-aggrandizement. Politics abhor a vacuum: when available power is left untended, some one always rushes in to seize it.

## ENGLAND

### HOUSE OF LORDS

Until 1832 the existence of the House of Lords raised no critical problems; the only disputes were those of personal and corporate dignity at issue between it and the House of Commons. The Lower House was, indeed, until towards the end of the eighteenth century the Lower House, in spite of the convention that its position regarding finance was superior. In every aspect of government—legislative, critical of policy, formative of Ministries,—the House of Lords was superior to the House of Commons.<sup>2</sup> The Houses were often in disagreement, but this was merely because alignment of personal and party forces in the two Houses did not happen to agree, owing to the results of elections or the ambitions and intrigues of faction and Court.

The main difficulty of recent generations, however, did not exist,

have the advantage over the more reserved and less resourceful leader. . . . On the other hand, the man with more money or mere talent for slipping softly around and winning state legislators . . . probably has less chance under the system of popular election. . . . It was prophesied that the system of popular election would make re-election more difficult and that the practice of retaining Senators for long terms and drawing benefits from their experience would be abandoned; but events have hardly borne out the prophecy.' See also Haynes, *The Changing Senate*; Lindsay Rogers, *Where Statesmen come from* (*New Republic*, 30 July 1924); Bruce, *American Parties and Politics*, p. 151; Pepper, *In the Senate*.

<sup>1</sup> Maine, *Popular Government*, London, 1918, p. 226.

<sup>2</sup> Cf. Firth, *The House of Lords during the Civil War* (1910); Turberville, *The House of Lords in the reign of William III*, London, 1913; and *The House of Lords in the Eighteenth Century*, Oxford, 1927.

that is, disagreement between the two Houses as units, arising from the diversity of their very composition and character. On the contrary, the social elements which begot the constitution of the eighteenth century, enabled the House of Lords, without any strain, to control the House of Commons, and this for two reasons: the personal position of the aristocracy, and the lack of constitutional challenge. The aristocracy dominated both Houses, because they acquired dignity from their landed possessions—they possessed all the territory of England, Scotland, Wales and Ireland—which gave them the position of local sovereigns and the prestige of wealth, from their ancient standing in many cases, and, in all cases, from their ennoblement by the Crown. 'The King of England', said Disraeli, notoriously enamoured of the *jeunesse dorée*, 'may make Peers, but he cannot make a House of Lords. The order of men of whom such an assembly is formed is the creation of ages.' These had always possessed the superiority in Government; neither powerful reason nor force threatened this legacy, hence they continued 'naturally' to form Ministries, with the occasional adjunct of a great commoner or learned judge. Moreover, a very large proportion of the constituencies of the Commons were in their pockets<sup>1</sup>: they were the all-powerful 'bosses', who dispensed local and central patronage, bribed and intimidated the voters, to form their 'connexions'. The House of Commons responded. Hence the real political struggle was hardly between two Houses: it was between the inarticulate country and Parliament; and between King and Parliament. And, to come to the second reason why there was no strain between the Houses, there was no continuous challenge from the people—at least until the era of reform—which began about 1780 and ended its first phase in 1832. There was as yet no economic challenge—Lords and Commons were much of the same class. There was a religious challenge, but it was damped down with the tacit and spasmodic connivance of the ignorant and bigoted multitude. There was no widespread sentimental challenge for freedom of opinion and self-government.

By 1832, the forces of an entirely new era had matured; they no longer 'pitied the plumage and forgot the dying bird'; the struggle over the Reform Act revealed their strength, and ended with the violent defeat of the House of Lords and the adoption of an electoral system for the Commons which was bound to make the House of Lords permanently hostile, permanently defensive and ultimately powerless. The foundations of authority had shifted, and whereas, ever and again, they more soundly buttressed the House of

<sup>1</sup> Cf. Namier, *The Structure of Politics at the Accession of George III* (1929). In I, 176–181, it is shown that a total of fifty-one Peers nominated members of the Lower House (or influenced their election) for 101 seats. Cf. *England in the Age of the American Revolution*, London, 1930, by the same author.

Commons, the House of Lords declined into the position of a conscious excrescence. The representative principle continuously renewed, invigorated, and adapted the Commons, which became the rightful bearer of power. That same principle was, and is, a continual reprimand to the House of Lords. It is suffered to exist—suffered, why?

**Present Composition.** At present the House of Lords is composed of four classes of members: (1) Hereditary Peers, about 620<sup>1</sup>; (2) Scottish Representative Peers (elected for each Parliament) 16,<sup>2</sup> and Irish Representative Peers, 28 (elected for life)<sup>3</sup>; (3) Archbishops and Bishops, 26<sup>4</sup>; (4) Six Law Lords, or Lords of Appeal appointed for life.<sup>5</sup> Class (3) become legislators by virtue simply of professional success in the ranks of the Church of England. They are not excluded from the legislative and executive functions of the House other than religious affairs. They may be said to represent the spiritual and proprietary interests of the Church of England in government, but the vast numbers of religious people who are outside this Church receive no representation as such. Class (2), the Scottish and Irish Peers, are elected by their fellows, and the peer-members of governments have occasionally managed the elections to secure the success of the capable, and those likely to support their policy.

Class (1), the hereditary peers, consist of two groups which must be very carefully distinguished: the 'accidents of an accident' as Bagehot has called them, and those honoured for proven or presumed virtue. The first group forms the great bulk of the House—their rank and title to sit and exercise power arises from the fact that they are the eldest sons of their fathers and mothers. All may, and some, have the makings of capable legislators, but no test of their aptitude is applied, and even if ability were positively proved, the modern world has rejected the application of ability to government unless it is ability which represents the interests of those expected to obey the law. With the exception of about a score, these hereditary legislators are usually absent from the proceedings of the House, whose benches are conspicuous by their red-plush vacancy. But the right to attend, speak, and vote exists<sup>6</sup>: and it is used by large numbers when the interests of the country, in the estimation of the party managers, are in danger. We return to this presently. The second group, quite large in recent years, is in the first generation, composed of those ennobled for political and social services. These are of three kinds: those securing the benefit of the nation by political office, as in the case of such men as Wellington, Disraeli, Iddesleigh, Sherborne, Rhondda, Asquith, Birkenhead, Banbury, Curzon, Balfour, Beatty, Reading, Ullswater; secondly, those redounding more im-

<sup>1</sup> Cf. Debrett, *Peerage and Baronetage*.

<sup>2</sup> *Ibid.*, loc. cit.

<sup>3</sup> Appellate Jurisdiction Act, 1876.

<sup>4</sup> *Ibid.*, loc. cit. and p. 71.

<sup>5</sup> *Ibid.*, loc. cit.

<sup>6</sup> Cf. Anson.

mediately to the benefit of a party, or its organization, or finances ; and those applied in charitable works or gifts, or in the world of science and art. Perhaps there should be added to this group some, mediocre in talent and character, who are elevated to the peerage because the government of the day needs spokesmen in the Lords or must fill Household appointments.

Thus, there is no popular, or occupational, elective principle in the composition of the House of Lords. How far the mentality of the House divides according to the main divisions of public opinion is determined only by the interests and the individual mentality of the peers, and, in the case of recent creations, by the party to which the new peer belonged. Of those whose party membership is known, it is computed that over 500 members belong to the Conservative Party, eighty-four to the Liberal Party, and thirteen to the Labour Party.

**The Powers of the House of Lords.** The House of Lords had until the Parliament Act of 1911, four branches of power : Judicial, Legislative, Financial, and Executive. We cannot here treat of the first, the judicial, except to say, that the House is the Supreme Court of Appeal in civil cases for Great Britain and Northern Ireland, and that in this function, only the Lords of Appeal and the Lord Chancellor participate.<sup>1</sup> That work still continues untouched by the Act of 1911.

As regards ordinary legislation, Public and Private, the House of Lords was on a par with the Commons, having as full a right of initiative and amendment and rejection.<sup>2</sup> In fact, few bills were introduced in the Lords, since the centre of gravity in the Commons had shifted to the Cabinet based upon the Commons, and able to control the time-table of that House. The important question is, how the House of Lords used its legislative power, and upon what theories it proceeded.

Somewhat similarly in regard to the financial power. In 1614 the Lords admitted the exclusive right of the Commons to initiate money-bills ; in 1671 the Commons successfully challenged and denied the right of the Lords to reduce taxes, while the convention that the Crown asks for supplies came to mean that the Cabinet alone, and not ordinary members, could increase expenditure or taxation. The general convention that money bills could not be amended by the Lords, but only accepted or rejected 'without diminution or alteration', was obeyed until the Budget of 1909, but with some slight deviations, concerned with customs duties, upon which occasions the Commons saved their privilege by introducing a new bill incorporating the amendment. The power to reject a money-bill was used once, in

<sup>1</sup> Cf. Odgers, *The Courts of Law*.

<sup>2</sup> Cf. Anson, *The Law and Custom of the Constitution*, 3rd Ed., 1907, Part I, Chap. VII, p. 260 : 'The House of Lords is, for legislative purposes, co-ordinate with the House of Commons.'



1860, when the Paper Duties Bill, repealing the duty, was thrown out, after the enactment of a property tax and stamp duties, intended to provide the revenue lost by repeal of the paper duties.<sup>1</sup> A furious controversy arose, the majority of the Commons contending that the power ought not to have been used, or as Erskine May has it, 'If the letter of the law was with the Lords, its spirit was clearly with the Commons'. The House of Commons voted a solemn protest,<sup>2</sup> the import of which was that the Lords had no authority to touch bills to 'grant supplies—to provide the ways and means for the service of the year'. The paper duties were later repealed by the inclusion of the enactment in the Finance Act of the Year—by 'tacking'—and the Lords could not fail to accept this, since rejection would have involved a further dispute of a more serious nature, because directly concerned with the annual finances. A time came when the confusion of policy and finance raised fatal issues for the Lords, and their temerity drew upon them the wrath and destruction of the representative principle—in 1909; to that we return presently.

Finally, the House of Lords questions the Government and debates its policy. It does not control the executive in the sense we shall see to be true of the Commons, for this body is immediately in touch with the electorate and the parties, and is of the same flesh and blood as the Cabinet. The Lords contributed members to the Cabinet during the nineteenth century, but in an ever smaller proportion, and never overthrew or thought to overthrow a Cabinet. They raised and may raise issues like the Commons, but they were never answered with the same earnestness.

**The Spirit of the House of Lords.** How were these powers used during the nineteenth century? All the works of the House of Lords in the nineteenth and twentieth centuries are accompanied with a note of apology or of excessive defiance, as though the House were not only upon sufferance, but knew it was on sufferance. It must find a reason for existing, and therefore it finds a reason in the only thing now considered capable of being reasonable, namely, the representative principle. It is now to save the people from their parliamentary representatives, by acting as a revising chamber, amending and rejecting bills sent up by the Commons, until such time as it is sufficiently clear that the people really desire the laws,—thus the Duke of Wellington.<sup>3</sup> That is to say, while remaining in existence, anxious and prepared to use their powers, the Lords suffered an inner con-

<sup>1</sup> May, II, 104-12.

<sup>2</sup> Ibid.

<sup>3</sup> Referring to the Reform Bill, the Duke of Wellington wrote: 'We here think that there is reason to believe that there is a very prevailing change of opinion in the country upon the subject of the Bill. At all events we think the House of Lords ought to give the country a chance of being saved by affording further time to consider the question' (*Correspondence*, Letter to the Marquis of Bath, VII, 531, cited in Spalding, op. cit., p. 155).

version. They conceded, under pressure it is true, their eighteenth-century superiority, some out of regard for the public welfare, others out of the last cry of their reason ; and to justify, and maintain, a remnant of power, they were compelled to use an argument ultimately quite fatal to it.

The House of Lords, with such a mentality, was moved by forces, mainly unconscious. It had a large reserve of strength founded upon its social position, and the extensive belief that there was something really virtuous in hereditary aristocracy and titles. How could, and how can, the inexperienced peasant or working man and woman, discern real merit apart from its wonted trappings ? As Pascal says : ' We need a highly refined reason to regard as an ordinary man the Grand Turk, in his superb seraglio, surrounded with forty thousand janissaries.' Estates, money, society, intimacy with the Court, commissions in the army and the navy, conspicuous and brilliant position at home and abroad, nice clothes, beautiful women, and thoroughbred horses ; the consciousness of ancient authority, the conceit of family and a strong, if narrow, love of ' country '—all these contributed to strength of purpose and safety from a direct and doctrinaire assault by Commons and people. Moreover, democracy was untried. This was the strength of the House of Lords ; and it proceeded to use it.

Almost every Liberal measure was amended or rejected, while Conservative measures which most accorded with its interest-begotten prejudices, received usually a safe passage, until Gladstone even, was moved to become the herald of the ultimate storm against the profession of the House of Lords that it represented the *permanent* opinion of the country.<sup>1</sup> The landlords' position in regard to tenants' improvements was defended, religious and political equality was denied, the Universities were kept closed to Dissenters, army privileges were maintained, counsel for poor prisoners refused, Ireland maltreated, municipal improvement thwarted, parliamentary reform (bribery and ballot laws) rejected or mutilated, humane measures like the Deceased Wife's Sister Bill held up for years, the first Employer's Liability Bill decisively rejected. They bolstered up the Church of England at the expense of Nonconformist rate-payers, and then, in the Liberal era of 1906 to 1914, they wellnigh stultified its great majority by defeating the Education Bill, the

<sup>1</sup> August 30, 1884. Cf. Morley, *Gladstone*, Book VIII, Chap VIII : He says that, since 1832, there were twelve parliaments ; eleven Liberal, one divided (1841-7), and one Tory (1874). ' Well, here are ten parliaments on the one side ; here is one parliament on the other side. . . . The House of Lords was in sympathy with the one parliament and was in opposition to the ten. And yet you are told, when,—we will say for forty-five years out of fifty—practically the nation has manifested its Liberal tendencies by the election of Liberal parliaments, and once only has chanced to elect a thoroughly Tory parliament, you are told that it is the thoroughly Tory parliament that represents the solid and permanent opinion of the country.'

Licensing Bill, the Scottish Land Bill, and the Plural Voting Bill. The methods adopted were ingenious: principles were destroyed obliquely, without the enunciation of the true motives which caused their destruction. It was pretended that bills had come up to the Lords too late in the session for due deliberation; so many impossible amendments were added that the purpose and efficacy of legislation were frustrated (forcing a compromise).

**Attempts at Reform.** The theorists of the Victorian era had not reckoned with the ultimate effects of such legislation as the Franchise Acts of 1867 and 1884. Its consequences in terms of reform, especially social reform, speedily became apparent after these dates. The House of Lords could not but attempt to defeat them. Its leaders, however, saw that this must result in destruction, unless the House could improve its claim to conduct which became only a representative body. Hence proposals began to be made for reform—all in the direction of denying the simple claim of inheritance to govern and admitting the validity of the representative principle. The first of these was in 1869 when Lord Russell's Bill provided that the Crown should be authorized to create *life Peers*, but only up to the maximum number of twenty-eight and not more than four in any one year, and these life-peers were to be taken from any of six given categories, namely, (i) Scotch and Irish non-representative Peers; (ii) Persons who have been members of House of Commons for ten years; (iii) Officers in the army and navy; (iv) Judges of England, Scotland or Ireland, and certain other high legal officials; (v) Men distinguished in literature, science and art; (vi) Persons who have served the Crown with distinction for not less than five years.<sup>1</sup> This timid proposition was defeated because of its terrifying implications, by 106 to 76.

Two admissions made by Lord Salisbury in the debate, reveal at once the view of the House which was shaping in the minds of some Peers, and the palpable insufficiency of the House as a partner in modern government.<sup>2</sup> Lord Salisbury declared that the Bill would

'tend to meet all the large advances of democracy as the third power of the State, as we must meet those advances by making this House strong in the support of public opinion, strong in its influence in the country, and strong in the character and ability of those who compose it'.

And again,

'We belong', he said, 'too much to one class, and the consequence is that, with respect to a large number of questions, we are all of one mind. Now that is a fact which appears to me to be injurious to the character of the House as

<sup>1</sup> Cf. Spalding, *op. cit.*, p. 108.

<sup>2</sup> *Ibid.*, p. 114.

a political assembly in two ways. The House of Lords, though not an elective, is strictly a representative assembly, and it does in fact represent very large classes in the country. But if you wish this representation to be effective you must take care that it is sufficiently wide, and it is undoubtedly true that, for one reason or another, those classes whose wealth and power depend on commerce and mercantile industry do not find their representation in this House so large or so adequate as do those whose wealth and power depend upon the agricultural interest and landed property. . . . We want, if possible, more representations of divers views, more antagonism. There are a vast number of social questions, deeply interesting to the people of this country, especially having reference to the health and moral condition of the people, and upon which many members of your Lordships' House are capable of throwing great light, and yet these subjects are not closely investigated here because the *fighting power* (my italics) is wanting, and the debates cannot be sustained.'

Other attempts at reform were made in 1874 by Lord Rosebery, and in 1888 by Rosebery and Salisbury. In the first, Rosebery observed that the House did not command respect because it did not represent dissenters, medicine, science, literature, commerce, tenants of land, arts, the colonies, the labouring classes—a truly sufficient damnation. He suggested the institution of life-peers, presumably from the categories of the hitherto unrepresented. The motion for an inquiry was defeated. Again in 1888 Rosebery made proposals: 'The House of Commons rests upon the votes of some 6,000,000 persons. What we represent is not so easy to divine.' He proposed that the House be decreased in size by the election of representatives of peers by their fellows; then there were places for members chosen by the County Councils (then newly created), the larger municipalities, and by the House of Commons, and life and official Peers, and representation of the Colonies. Salisbury proposed the addition of fifty life-peers, not more than five to be created in any one year. Of the five three were to be chosen from certain categories, and two from outside.<sup>1</sup> No more was heard of House of Lords reform until 1907, for until then Conservative Governments ruled the country. Is it not true, and true again, that few people possessing power will relinquish it out of simple consideration for the public good, and that only force or the threat of worse to come has produced concessions? In 1907 the House set up a Select Committee to consider the suggestions made from time to time to increase the efficiency of the House in legislation. The Report<sup>2</sup> suggested a new constitution for the House: (1) Peers of the Royal Blood (a class always included hitherto); (2) the Lords of Appeal in Ordinary; (3) 200 representatives elected by the hereditary peers; (4) hereditary peers possessing special qualifications; (5) spiritual Lords of Parliament; (6) Life Peers.

<sup>1</sup> Ibid.

<sup>2</sup> Report from the Select Committee of the House of Lords. Appendix A (234), December, 1908.

1910. It was too late<sup>1</sup>: only under the pressure of attack of imminent and serious threat did the Peers propose a new plan.<sup>2</sup> Too late! for they attempted to use their power of forcing a government to take its measure to the country, in relation to the Finance Bill of 1909. The House by a vote of 350 to 75 rejected the Bill.<sup>3</sup> This was to employ a power which had never been used since the modern Budget system had been evolved, which the House of Commons had solemnly claimed ought not to be used, and which was a direct challenge to the authority of the Cabinet. The Bill was certainly provocative, for it introduced a very steep progressiveness in the income tax, death duties, a tax upon mineral royalties, and land values duties. It was bound to provoke those whose estates and fortunes would be immediately affected. The Commons dissolved and a General Election took place in January, 1910, the government returning with a majority, though a depleted one. The Bill was reintroduced and the Lords yielded. The Commons proceeded to the next logical step: the Parliament Bill of 1910. All-party conferences attempted to produce an agreed scheme. It was impossible.<sup>4</sup> The government dissolved, and a fresh election took place in December, 1910, the main issue being reform of the House of Lords. The balance of power in the Commons was unchanged. The intentions of the government

<sup>1</sup> Note the Commons' resolution, on the motion of the Prime Minister (26 June 1907): 'That, in order to give effect to the will of the people as expressed by their elected representatives, it is necessary that the power of the other House to alter or reject Bills passed by this House should be so restricted by Law as to secure that within the limits of a single Parliament the final decision of the Commons shall prevail.'

A second Commons' resolution (2 December 1909) ran: 'That the action of the House of Lords in refusing to pass into law the financial provision made by this House for the Service of the year is a breach of the Constitution and a usurpation of the rights of the Commons.' Cf. also Spender, *The Life of Sir H. Campbell-Bannerman*, Vol. II, Chap. XXXV.

<sup>2</sup> Cf. Marriott, *The Mechanism of the Modern State* (1927), I, 427: 'The new Second Chamber was to be only about half as large as the existing House of Lords and was to be composed of three distinct elements: one hundred Lords of Parliament elected, as Scotch and Irish representative Peers are elected to-day, by the peers from among the peers, only those peers being eligible for election who were qualified by public service; one hundred and twenty Lords of Parliament chosen by some method of indirect election and with regard to the principle of proportional representation; and one hundred Lords nominated by the Prime Minister of the day. In addition, Princes of the Blood Royal, the two Archbishops and five Bishops, and the Law Lords were to find places in a Second Chamber which would number less than 350 in all.' These proposals were contained in a Bill introduced by Lord Lansdowne in 1911.

<sup>3</sup> At the time the House of Lords consisted of about 554 members, so that a very large percentage was present.

<sup>4</sup> The Constitutional Conference of 1910 numbered eight members: The Prime Minister (Asquith), the Chancellor of the Exchequer (Lloyd George), the Earl of Crewe, and Birrell representing the Government; and Balfour, Lord Lansdowne, Earl Cawdor, and Austen Chamberlain, the Opposition. Advanced Liberal and Labour opinion was hostile. The first meeting of the Conference took place on 17 June and the twenty-first and final meeting on 10 November 1910. The Prime Minister announced that it broke up without reaching any agreement and that its members did not favour disclosure of its deliberations. Cf. Fitzroy, *Memoirs*, II, 423.

were carried, but accepted by the Lords only after the declaration that the King had consented to the creation of sufficient peers to overcome obstruction. Various manœuvres followed resulting in some queer cross-voting, but by 131 to 114 the Bill was passed.

**The Parliament Act and its Effects.** The Act <sup>1</sup> was declared to be only a stage towards a more fundamental reform, and confined itself to immediate tasks. It took away financial powers from the Lords, by providing that Money Bills, after passage by the House, must be sent up to the Lords at least one month before the end of the Session, and if not passed without amendment within a month shall become an Act of Parliament with the royal assent and without the consent of the Lords. Money Bills are defined, but not in such detail as to avoid possible conflict, and the Speaker of the Commons is the ultimate authority for the certification that a Public Bill is a Money Bill. Broadly, the Lords have lost all powers over taxation and appropriations for expenditure.

As regards other Public Bills, the absolute veto power of the Lords was converted into a suspensive veto of the uttermost limit of three years: a bill passed three times in three successive sessions, two years having elapsed between the second reading on the first occasion and the third reading on the last occasion, passes for the Royal Assent without acceptance by the Lords.

This is the extreme power of the Lords, to hold up a bill for such time. Within it, it may amend as it will, with the possible pain of having amendments rejected if the Commons can hold out for the three years and find the time for repassage as demanded by the Act.

From the plain terms of the Act, and the general nature of political forces in the country, the following deductions could be made as to the parliamentary results of this reform:

(1) That in times of Conservative rule the Lords would use their power of amendment on details, excepting where the government was swept along by electoral forces to undertake social reforms, but that ordinarily the Lords would be nothing but the stage in which verbal amendments, and the government's own voluntary amendments, were undertaken.

(2) That in times of Liberal or Labour governments the Lords would not hesitate to use their power in the case of a serious clash of opinion, (a) would put the Government to the difficult task of finding time to do their work thrice over and (b) obtain concessions where the Government urgently needed the Bill and could not find the time or did not wish to wait three years.

(3) That in times of Liberal or Labour governments the House of Lords would virtually be the supporter of the Conservative Opposition in the House of Commons and work hand-in-glove with its leaders.

<sup>1</sup> 1 & 2 Geo. V, Ch. 13.

Experience since 1911 has amply borne out such deductions, but two subjects need special emphasis. The first is that the House of Lords has been used by all governments as a stage in which they have introduced technical or political amendments suggested by the influence of the sense of the House of Commons, recommended by experts, or solicited by interested groups. Yet it is obvious that any democratically composed body, a committee of the House of Commons itself, would serve this function: for the amendments we speak of are rarely initiated by the Lords or by members of the Government. Secondly, the existence of a minority government, unsure of parliamentary support, though normally possessed of it, becomes the sport of the House of Lords.<sup>1</sup> It can be squeezed successfully, especially where a Bill is urgent; and where a Bill is urgent any government makes concessions rather than enter upon a time-wasting constitutional conflict.<sup>1</sup> Not one bill, excepting the Home Rule Bill of 1912, has been forced through the procedure of the Parliament Act. A survey<sup>2</sup> of the legislative behaviour of the House of Lords since 1919 serves, further, to show the social groups to which it has been generous and those to whom it has been ungenerous. In the first class are landlords, the clergy, the taxpayers generally (where administrative institutions requiring the expenditure of money have been rejected), employers, rentiers, agriculturists, agricultural machinery manufacturers, landlords who wished power of eviction from their property, criminals in the course of trial (regarding evidence, witnesses, Grand Juries, etc., but not sentences), private electricity undertakings, ordinary jurisdiction as against administrative jurisdiction (Landlord and Tenant Bill, 1927), individual rather than governmental or municipal enterprise. It has been positively unfavourable to State control over private enterprise and activities, local and central government expenditure, public libraries, housing efforts, agricultural labourers, the unemployed insured, allotment holders, education and trade unions.

**Moral Position.** On the whole, the Parliament Act, by its very existence as the embodiment of protests against the House of Lords,

<sup>1</sup> Cf. the Government's difficulty with the Dyestuffs Act: 'The House of Lords decided yesterday without a division to insist on its Amendment to continue for another year the operation of the Dyestuffs (Import Regulation) Act, 1920. Afterwards there were various conferences of Ministers, as a result of which it was agreed that the House of Commons should not be asked to continue the struggle further. It was recognized that the drop in the Government majority from thirty to six and the criticism of the Government's attitude from the Labour Benches had materially altered the position and it was also known that had a division been challenged in the House of Lords the majority against the Government would have been larger than on the previous occasion.'—*The Times*, 19 December 1930, p. 12. Cf. also Coal Mines Act (amended), the Education Bill, 1930 (dropped), plural voting and the university vote replaced in the Representation of the People Bill (1931), and the state-acquisition of land for experimental purposes was struck from the Land Acquisition Act of 1931.

<sup>2</sup> An examination of the Journals of the House of Commons since 1919.

has tremendously weakened the moral position of that House. It is more on sufferance than ever. Then why does it still exist? For several reasons. A second chamber, any second chamber, has some utility, where legislation is complicated and only time and many minds can secure the soundness of its substance and the excellence of its drafting. Next, the House of Lords is still a forum of debate on the administrative activity of the government, and lack of time in the Commons gives the other House an opportunity of useful service. Again, the Lords contains a number of able legislators and administrators whose ability serves to weaken the full force of arguments against the existence of the House. It is helpful in the passage of Private Bills. Further, no non-conservative government has yet come into existence with a sufficiently strong majority to make away with it, and the difficulties of mere reform are enormous; and it must be remembered that though the House does not issue from election its opinion nevertheless coincides with that of some millions of people. It defends what they are glad to see defended. Yet there are Conservatives who see the need for reform. Some demand the strengthening of the power of the House, but that would certainly invite its abolition. Others seek to alter its composition, so that in the future it will be able to justify its power by popular elements.

If we treat the Conservative idea of a second chamber as impossible nowadays, there is hardly a halt to abolition, for reform of the existing House is impossible. It is this House by inertia, or none at all by abolition; for almost every plan suggested since 1911 is impracticable. The Bryce Conference on the Reform of the Second Chamber,<sup>1</sup> which was the most scientific and careful inquiry, fell into two difficulties, each unanswerable: (1) the powers were too great for progressives<sup>2</sup> and too small for conservatives; (2) the indirect method of election was cumbrous,<sup>3</sup> too undemocratic for progressive politicians and not

<sup>1</sup> *Conference on the Reform of the Second Chamber. Letter from Viscount Bryce to the Prime Minister, 1918, Cd. 9038.*

<sup>2</sup> The suggested powers were to be (*loc. cit.*):

(i) In the case of Money Bills, a Finance Committee composed of about seven members of each House, chosen at the beginning of each Parliament, to determine what constitutes a Money Bill. (Under the Parliament Act the Speaker is the arbiter.)

(ii) A 'Free Conference' composed of sixty members ('thirty chosen by each Chamber, twenty members being selected for the lifetime of the Parliament, and the remaining ten *ad hoc* for each particular Bill') to consider a Bill on which the two Chambers disagree. The Conference to sit in secret and to be empowered to reject or amend the Bill. In case of rejection, the Bill would die. In the more probable case of amendment, should either House reject the amended Bill a delay of one session would follow. At the end of this period the Conference could either fail to report the Bill back in the same form (which would entail the death of the Bill) or return it without amendment, by a majority of not less than three. In the latter instance, acceptance by the House of Commons would enable the Bill to become law even if the House of Lords should disagree.

<sup>3</sup> The indirect method of election involved the division of Great Britain into thirteen areas and invested 'the election of the representatives for each area in the



aristocratic enough for conservatives. Other schemes have come from Conservatives, some in the House of Commons, others in the House of Lords, but they have been based upon the principle that the House shall keep substantial powers as at present, or obtain even more, and upon a large element of hereditary representation.<sup>1</sup> But no Conservative Government would really attempt reform: who knows where a war will end? In fact, the party leaders deprecate discussion even at party Conferences. Progressive opinion inclines to the creation of a small body chosen by the House of Commons from among its own members or from outside at its discretion, with a revising power over ordinary bills to include (a) drafting amendments, (b) amendments of substance, and (c) power to require a short suspension, and then reconsideration by the Commons. But the Commons are supreme, and carry that supremacy even to the challenge of the Rules of Procedure of the Revising Committee.<sup>2</sup>

This reform is likely to be undertaken within this generation, but the conditions will not be passionless, nor deliberate. It will come in the course of an attack by a strong Socialist Party upon, what the Lords will call, the 'fundamental institutions of the State'.

hands of the members for the House of Commons sitting for constituencies within the area'. Secondly, there were to be eighty-one members of the existing peerage (a number to be eventually reduced to thirty). The method proposed was election by a 'joint Committee of ten members, five to represent the new Second Chamber, chosen by the Committee of Selection for that Chamber, and five to represent the House of Commons chosen by the Speaker'. The vacancies created by the gradual reduction in the number of peers were to be filled by the same committee, but without restriction to the peerage.

<sup>1</sup> The Government resolutions of 11 July 1922 provided that 'in addition to Peers of the Blood Royal, Lords Spiritual and Law Lords' there should be '(a) Members elected, either directly or indirectly from the outside; (b) Hereditary Peers elected by their Order; (c) Members nominated by the Crown, the numbers in each case to be determined by Statute'. The reconstituted House was to consist approximately of 350 members. The decision as to whether or not a Bill was a Money Bill was to be referred to a Joint Standing Committee, appointed at the beginning of each Parliament and composed of seven members of each House, in addition to the speaker (ex-officio Chairman). The Parliament Act of 1911 would be maintained with exception of 'any Bill which alters or amends the constitution of the House of Lords as set out in these Resolutions, or which in any way changes the powers of the House of Lords as laid down in the Parliament Act and modified by these Resolutions'. The term of office of members (under (a), (b) and (c)) was to be fixed by Statute, re-election being permissible. Cf. *Lords Debates*, 1922, Vol. 51, col. 324.

<sup>2</sup> Cf. Lees-Smith, *Second Chambers in Theory and Practice*, p. 246 ff. This scheme is based on the Norwegian system which is as follows: The newly-elected Storting elects one-quarter of its members to form a Second Chamber (Lagthing) whilst the remaining three-fourths (Odelsting) constitute the first Chamber. The Lagthing may only consider ordinary legislation (i.e. neither Finance nor Constitutional Bills) and may not initiate any Bills. Its right of amendment is restricted: If it returns a Bill with amendments already once rejected by the Odelsting—a full meeting of the Storting is required and a two-thirds majority necessary for the passage of the Bill (cf. *ibid.*, p. 192 ff.). Cf. also H. J. Laaki, *The Problem of a Second Chamber*, Fabian Tract, No. 213 (February, 1925); S. Webb, *The Reform of the House of Lords*, Fabian Tract, No. 188 (November, 1917). Cf. also Roberts, *The Functions of a Second Chamber*.

Until that time, especially when the House of Commons is itself divided, every indication is that the House of Lords will continue to exist and operate as it has done since 1919. When the reform comes the importance of public-spirited and appropriately organized and regulated political parties will become even more essential than it is to-day. At present, the glaring and amazing truth is that Britain is governed only by a quasi-democratic assembly, for the House of Lords stands in direct and practical opposition to the principle of majority rule. This, whether for good or ill, is the result of a non-revolutionary development of political institutions, and the consequent lack of declaration of absolute principle like that which appears in Continental and American constitutions.

**Conclusion.** Before we pass to a consideration of the power and procedure of First Chambers, we must ask what our survey of Second Chambers teaches regarding them. We have seen that when there are two Houses there necessarily follows a contest for power. Each House gets and keeps whatever it can. No exact prediction can be made of the final outcome of any specific constitution, for this is settled by the balance of power, social, economic, moral, in the community, and this is so complex and so unfixable for any length of time ahead, that the nicest predictions are bound to be upset. If the Houses are built on different foundations, the differences inevitably produce consequences in terms of the balance of power, whatever the intentions may have been. Only party can overcome the differences, but the very differences strain and break the unity of parties, by introducing a new corporate loyalty which collides with party. The question, then, is, whether the complexity of constitutional machinery, the blindness to ultimate power-relationships, the defectiveness of party, and the checks and brakes upon government, are together worth the security given by a Second Chamber. That security is of no value unless it implies the introduction of sobriety and wisdom into government. Suppose, however, that it is possible for the Lower Chamber to provide good sense, adequate representativeness, sober and conscientious debate and procedure, mature reasoning: then, where is the need for a Second Chamber, at such a cost? One maxim is of all political maxims sound: never to create an institution when it is not necessary. If other institutions fulfil the conditions of good government, a Second Chamber is not necessary. Whether such an institution should be set up obviously depends upon the answer which each country can give to these questions: Are the deputies wise; do the parties think out their programmes adequately, and are they sincere in their intentions; is there a parliamentary sense of justice and tolerance which will prevent persecution; how far is the Lower Chamber aided and rescued from the blunders of ignorant benevolence by the expert professional civil servants;

how far does the Lower Chamber possess and master adequate sources of information about the state of the country, domestic and foreign, and a procedure which passes the laws after adequate debate, and in such style as to avoid internal contradiction or erroneous record of legislative intention? These questions are answerable for each country from the facts we have already recounted ; they will be even better answerable when we have analysed the manner of action of the Lower Chambers. We may be sure, however, that wherever there are interests which desire defence from the grasp of the majority, a bicameral system will be claimed ; for even delay of an undesirable policy is already a gratifying deliverance.





